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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

RAINBOW NAVIGATION, INC., and
INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS,

Petitioners,

v.

DEPARTMENT OF THE NAVY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

A dispute between the United States and the Republic of Iceland concerning the ocean transportation of military cargo was resolved by a compromise embodied in a treaty and accompanying memorandum of understanding which create a limited (and first) exception to the Cargo Preference Act of 1904. The questions presented are:

1. Whether, in interpreting the agreements, the Executive Branch may ignore both the record of the Senate ratification process and its own contemporaneous implementation of the agreements?

2. Whether the court of appeals erred when it held that the agreements protect U.S. flag service "as a whole" rather than "existing U.S. flag service" in plain disregard of the explicit and authoritative representations of the Executive Branch to the Senate as to the meaning of the agreements and the initial and contemporaneous implementation by the Executive Branch?

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RAINBOW NAVIGATION, INC., and
INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS,

Petitioners,[1]

v.

DEPARTMENT OF THE NAVY, et al.,

Respondents.[2]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 911 F.2d 797 (1990) and is reproduced at App. 1a-13a.[3] The opinions of the United States District Court for the District of Columbia are reported at 686 F. Supp. 354 (1988) (preliminary injunction) (App. 35a-48a) and 699 F. Supp. 339 (1988) (permanent injunction) (App. 14a-34a).

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[1] Petitioner Rainbow Navigation, Inc. ("Rainbow") is a privately-owned corporation with neither a parent nor any subsidiaries. Petitioner International Organization of Masters, Mates and Pilots (the "MM&P") is a union which represents the officers and crew of Rainbow's ship.

[2] Respondents are the Department of the Navy and its branch, the Military Sealift Command (collectively the "Navy"), and certain individual officers and employees of the Navy: H. Lawrence Garrett, III (Secretary of the Navy), Admiral Frank R. Donavan (Commander of the Military Sealift Command) and William A. Neustadt and George E. Reiber (contract administrators). The other party in the litigation below was the Iceland Steamship Company, Ltd. ("Eimskip").

[3] "App." refers to the Appendices to this Petition.

JURISDICTION

The Court of Appeals for the District of Columbia Circuit entered its judgment and opinion on August 24, 1990 (App. 1a-13a) and denied a Petition for Rehearing and Suggestion for Rehearing *En Banc* by orders dated November 7, 1990 (App. 49a and 50a). By order dated December 4, 1990 (App. 51a) the court stayed its mandate under Fed. R. App. P. 41(b) to permit the injunction to remain in effect pending the filing of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (Supp. 1990).

TREATY AND STATUTORY PROVISIONS INVOLVED

Appendix B contains the following provisions: the Treaty Between The United States Of America And The Republic Of Iceland To Facilitate Their Defense Relationship (the "Treaty") (App. 1b-3b); the Memorandum Of Understanding Between The United States Of America And The Republic Of Iceland In Implementation Of The Treaty To Facilitate Their Defense Relationship (the "MOU") (App. 4b-5b); and the Cargo Preference Act of 1904 (the "1904 Preference Act"), 10 U.S.C. § 2631 (1983) (App. 6b).

STATEMENT OF THE CASE

The constitutional issue at the core of this case has already attracted a considerable measure of legal commentary. The district court's opinions were discussed in a concurrence to *United States v. Stuart*, 109 S. Ct. 1183, 1197 (1989) (Scalia, J., concurring), with speculation as to the position the Solicitor General might take were the case to come before the Court. One commentator has observed that "whether the executive is bound by the Senate's understanding of the meaning of a treaty at the time of ratification . . . is the constitutional question at the heart of the controversy, evident in both *Rainbow Navigation* and the debate on the ABM Treaty."[4] However, this question must be viewed against the background of the dispute which led to the negotiation and ratification of the Treaty and MOU in the first instance. That background and the immediate history of this case are summarized below.

[4] Trooboff, *Commentary On United States v. Stuart*, 83 Am. J. Int. L. 918, 922 (1989).

Background

Under the 1904 Preference Act, U.S. flag merchant vessels – vessels built in the U.S., controlled by U.S. citizens and manned by U.S. merchant seamen – are entitled to carry all U.S. military ocean cargo as long as such vessels' rates are not excessive or otherwise unreasonable. The purpose of the preference is "to promote vitality and emergency availability of American ships and to offset the disadvantage incurred in meeting foreign competition." *Curran v. Laird*, 420 F.2d 122, 127 (D.C. Cir. 1969).[5]

Rainbow was created, with the encouragement of the Navy, to pierce the longstanding "monopoly of Icelandic shippers" in the U.S.-Iceland military cargo trade. 699 F. Supp. at 340 (App. 16a). Rainbow acquired the M/V RAINBOW HOPE, a small but full service U.S. flag vessel ideally suited to the special requirements of the trade.[6] Rainbow entered the trade in May 1984. Although the 1904 Preference Act entitled Rainbow to carry all of the U.S. military cargo in the trade, the capacity of the RAINBOW HOPE limited it to the carriage of approximately two-thirds of that cargo. The reaction of the Icelandic Government was immediate and forceful, threatening the substantial and vital U.S. military presence in Iceland with reprisals if Rainbow was permitted to remain in the trade. The U.S. managed to forestall any reprisals for about one year, but in the summer of 1985 the U.S. Government finally gave in to the demands of the Icelanders,

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[5] The central concern of the 1904 Preference Act is the national defense. The *Curran* court cited the House Report on the 1904 Preference Act to emphasize this point: "It is never safe or wise to depend on foreigners for the defense of our own country. Our dependence must always be on our own men and ships to uphold the honor and dignity of our flag in the time of extremity." 420 F.2d at 127 n.10 (citing H.R. Rep. No. 1893, 58th Cong., 2d Sess. 5 (1904)). In the 1904 Preference Act, Congress has made a policy decision that preparedness is worth paying a premium.

The U.S. Merchant Marine plays a vital part in the Navy's Desert Shield operations. However, the declining numbers of U.S. flag vessels and U.S. merchant seamen have forced the Navy to rely on foreign flag vessels for at least 75% of its chartered Desert Shield capacity. The Journal of Commerce, Sept. 12, 1990, at 12A.

[6] Among its capabilities, the RAINBOW HOPE can carry both loose and containerized cargo with protected, below decks storage for all types of cargo. The vessel also has onboard cranes which permit it to be self-sustaining, *i.e.*, it can load and offload cargo with its own equipment.

thus beginning the remarkable series of events culminating in this case.

On August 8, 1985 the Secretary of the Navy determined that Rainbow's rates in the Iceland trade were "excessive or otherwise unreasonable." Since Rainbow had gone into the trade with rates lower than those offered by the Icelandic shipping companies, the rate determination was patently pretextual. In an action brought by Rainbow and the MM&P, so found the district court (Greene, J. Harold H.), holding that "[h]owever desirable it might seem to one or more departments of the Executive Branch to develop and nurture good relations with Iceland, they have no authority to do so in defiance of a congressional mandate and to the detriment of American citizens or companies." *Rainbow Navigation, Inc. v. Department of the Navy*, 620 F. Supp. 534, 543 (D.D.C. 1985), *aff'd*, 783 F.2d 1072 (D.C. Cir. 1986). The Court of Appeals for the District of Columbia Circuit (per Scalia, J.) affirmed, noting that the "manner of the Navy's action in this case was extraordinary" and holding that the 1904 Preference Act did not allow geopolitical determinations to overcome the preference. *Rainbow Navigation, Inc. v. Department of the Navy*, 783 F.2d 1072, 1081 (D.C. Cir. 1986). As a result, Rainbow continued to carry military cargo pursuant to the 1904 Preference Act.

Ratification And Implementation Of The Treaty And MOU

1. *Ratification.* By the summer of 1986 the pressure from the Icelandic Government had again built to the point where the U.S. felt that it had to do something. At the same time, the first round of the *Rainbow* litigation had demonstrated the futility of unilateral action by the Navy against a U.S. flag company and contrary to the 1904 Preference Act. It was evident that a compromise was needed which would satisfy both flags.

On September 24, 1986 the U.S. and Icelandic Governments executed *ad referendum* the Treaty and MOU. As an accommodation to the demands of the Icelandic Government, the U.S. Government agreed to divide the military cargo departing in this one instance from the precise terms of the 1904 Preference Act. At the same time, both governments agreed to protect the economic viability of the existing service of each flag.

The Treaty, "[t]aking into account the historic participation of vessels operating for Icelandic shipping companies and vessels of the United States in the carriage of military cargo between the United States and Iceland" (Treaty Preamble; App. 1b), in pertinent part provides:

> Transportation services for cargo transported by sea between Iceland and the United States for purposes of the Defense Agreement shall be provided by vessels of the United States and vessels operated by Icelandic shipping companies on the basis of competition between United States flag carriers and Icelandic shipping companies pursuant to this Article. *Any such competition shall result in contract awards that ensure that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade.* To ensure achievement of these objectives, the percentage of cargo transported by sea for purposes of the Defense Agreement that is allocated between vessels operated by Icelandic shipping companies and vessels of the United States on the basis of such competition shall be determined by agreement between the United States and Iceland.

Treaty, Art. I (App. 2b) (emphasis added).

The MOU was executed concurrently with the Treaty and in pertinent part provides that the cargo shall be split on a 65/35 basis, with the lowest bidder getting the larger share and the lowest bidder of the other flag getting the smaller share. It also provides that if the 35% share goes to the U.S. flag, the U.S. flag rate shall be at a level which "adequately covers the carrier's costs, assuming normal efficiencies of operation, plus a reasonable profit." MOU, Par. 1 (App. 4b).

On September 30, 1986 a hearing on the ratification of the Treaty was held before the Senate Foreign Relations Committee. Senator Mathias, presiding over the hearing, questioned the Hon. Edward J. Derwinski, Counselor to the State Department and the principal architect of the Treaty and MOU:

* As to whether there was any "downside" to the Treaty, Counselor Derwinski replied that "there is no

real downside. . . . [O]verall, given the variety of interests here, I cannot see anyone who is a loser. I think it is a basic plus for everyone involved." *United States-Icelandic Treaty on the Carriage of Military Cargo: Hearing Before the United States Senate Committee on Foreign Relations*, 99th Cong., 2d Sess. 7 (1986).

* To Senator Mathias's question "[I]t is your considered opinion that there are no United States interests that will be injured in any way?" Counselor Derwinski responded "That's correct, sir." *Id.*

* Senator Mathias then asked "What about the current American flag carrier? Are there any plans in effect to save harmless the current cargo carrier that is now carrying supplies to the military base in Iceland?" Counselor Derwinski replied "My understanding is that the current carrier [Rainbow] has been involved in a number of discussions with appropriate authorities, and despite the fact that we could not provide, obviously, within the treaty for specific protection for an entity, *we did have in mind at all times the need to protect the interests of the current carrier*." *Id.* at 11. (emphasis added).

On October 8 the Senate Committee issued its report recommending ratification. *Report On U.S.-Iceland Defense Treaty*, S. Exec. Rep. No. 27, 99th Cong., 2d Sess. 1-4 (1986). The Report was unusual in that the specific language had been endorsed in advance at the hearing by Counselor Derwinski and the Executive Branch. That language included the following:

* "[T]he treaty will be implemented in such a way that the existing United States-flag service in the Iceland trade would not be disadvantaged as a result of the treaty." *Id.* at 3.

* "[T]he economic viability of the United States-flag service will be maintained just as if the 1904 act were fully in effect in the Iceland trade." *Id.*

The Treaty went to the floor of the Senate that same day. Senator Pell, noting that the Administration had committed "that the treaty will be implemented in such a way that the existing United States flag service in the Iceland trade would not be disadvantaged," urged ratification. The Senate consented to ratification without opposition. 132 Cong. Rec. S15,659 (daily ed. Oct. 8, 1986).

In essence, the Treaty and MOU contemplated that the carriage of U.S. military cargo in the Iceland trade would be the subject of a "periodic" competition in which both the class of U.S. flag carriers previously in the trade and Icelandic companies would compete. The low bidder in the competition - most certainly an Icelandic company - would get 65% of the cargo or roughly the amount of cargo previously carried by Rainbow. Thus, the Icelanders would get the lion's share of the military cargo in the trade in return for dropping their threats. At the same time, the preexisting class of U.S. flag carriers would be compensated for any diminution in business as a result of the Treaty and MOU. It was a compromise, no more and no less.

2. *Implementation.* Concurrent with the ratification process the Navy began to implement its understanding of the Treaty and MOU. The Navy's understanding of its obligations to the U.S. flag under the agreements was clear: to place a U.S. flag vessel of the type previously used in the trade by Rainbow under full-time charter, with the vessel available to carry both the 35% of the military cargo in the Iceland trade effectively reserved for the U.S. flag as well as for any other deployments the Navy might choose.[7]

In February 1987 the Navy issued a Request for Proposals (the "1987 RFP") for the first competition under the Treaty and MOU. The 1987 RFP followed the plan of compromise. There would be a single competition. The U.S. flag bids would be in two formats: a rate per ton for the "65%" cargo and a daily time charter rate (converted from the rate per ton) for the "35%" cargo. The net result was a daily time charter rate which would fully reimburse the U.S. flag carrier just as if it were carrying 65% of the military cargo in the Iceland trade when, in fact, it would only be carrying 35% of that cargo. At the same time, it would also give the Navy the availability of the U.S. flag vessel for

[7] A finding of the court of appeals which is inconsistent with this fact is discussed at 18, *infra*.

deployment in other trades. The 1987 RFP also embodied all of the pre-Treaty/1904 Preference Act conditions that existed in the trade for the U.S. flag. These conditions looked to a full-service vessel of the class represented by the RAINBOW HOPE, a vessel which could carry all types of cargo with underdeck stowage and self-sustaining capability.

As anticipated,[8] an Icelandic company, Eimskip, was the overall low bidder and received a contract for 65% of the cargo. Rainbow was the only U.S. flag bidder. It received a time charter contract which fully employed the RAINBOW HOPE in both the Iceland and other trades. Although this compromise satisfied both flags and resulted in lower costs for the Navy, the peace in the trade lasted less than one year. In 1988 the Navy, apparently acting "out of pique at resistance by means of litigation," 699 F. Supp. at 349 (App. 32a), changed its interpretation of the rights guaranteed to the U.S. flag by the Treaty and MOU.

The District Court Litigation

On March 25, 1988 the Navy issued a new Request for Proposals (the "first 1988 RFP"). The first 1988 RFP changed the procurement scheme dramatically and was based on the following strategy: since the Navy's basic requirements in the trade could be satisfied by the Icelandic carrier, the Navy would give 35% of the military cargo to the lowest cost U.S. flag operator it could find even if the latter otherwise would have been unsuitable for the trade. That would certainly do away with Rainbow and any other similarly capable U.S. flag operator. The Navy's candidate for replacing the pre-Treaty U.S. flag service was a new class of service via very small, open-deck supply vessels lacking: (1) the capacity to carry 65% of the cargo; (2) the speed and reliability to maintain schedules; (3) underdeck stowage for breakbulk cargo (these vessels can carry on-deck cargo only, with insufficient freeboard to protect that cargo from heavy seas); and (4) the on-board cranes necessary to be self-sustaining. As the district court found, "[o]nce Rainbow was eliminated, the small supply boat operators could be expected to depart, and the Icelandic shipping

[8] Apart from the generally lower costs of operating under a foreign flag, the Icelandic companies had the advantage of being able to carry commercial cargo in the trade, cargo that was largely denied to the U.S. flag.

companies would again have the monopoly – apparently the purpose of this and the other recent manipulations of the RFP provisions." 699 F. Supp. at 348 (App. 29a).

The first 1988 RFP effected these changes with a "belt and suspenders" approach to violating the Treaty and MOU. First, it provided for two separate competitions, one for the 65% share and one for the 35% share. Second, since the economic viability guaranteed the U.S. flag by a single competition would be rendered moot by dual competitions (*i.e.*, the revenues for the 35% carriage would presumably satisfy the costs plus profit for that isolated part of the carriage), there was no need for a time charter. Third, since the Icelanders would meet the Navy's operational requirements, the U.S. flag would be relieved of its responsibility to meet a schedule, to provide underdeck stowage or to be self-sustaining.

Rainbow and the MM&P again filed suit.[9] On May 17, 1988 Judge Greene preliminarily enjoined the procurement (he had earlier granted a temporary restraining order). While he took note of all of the deficiencies in the procurement, he focused for purposes of the preliminary injunction on the use of dual competitions. He found that the Treaty and MOU required a single competition. 686 F. Supp. at 359 (App. 45a).

The preliminary injunction propelled the Navy to a somewhat higher level of candor if not consistency. Moving for dismissal/summary judgment on or about June 24, the Navy announced that it was going to issue yet another version of the RFP (the "second 1988 RFP"). This procurement would provide for a single competition just as in 1987. The Navy's wisdom in this regard was aided not only by Judge Greene's opinion but also by the Navy's failure, in an effort that began six days after the temporary restraining order issued, to convince either the State Department or the Icelandic Government to consider an amendment to the MOU which would permit dual competitions. The

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[9] The jurisdiction of the district court was invoked under 28 U.S.C. § 1331(a) (Supp. 1990), 5 U.S.C. §§ 701-706 (1977), and 28 U.S.C. §§ 2201-2202 (1982 & Supp. 1990).

other changes proposed in the second 1988 RFP were no more than cosmetic.[10]

On November 15, 1988 Judge Greene granted summary judgment to Rainbow and the MM&P on all issues. He took note of the substantial bad faith that had been exhibited by the Navy throughout,[11] but that was not the basis for his decision. Rather, after a careful analysis of the history of the matter, the language of the Treaty and MOU, the Senate ratification proceedings and the initial implementation by the Navy, Judge Greene concluded that the Treaty and MOU included two undertakings, both of which have the force of law:

* First, "the *existing* United States-flag service in the Iceland trade would not be disadvantaged as a result of the treaty."
* Second, "the economic viability of that service will be maintained *just as if the 1904 Act were fully in effect.*"

699 F. Supp. at 344 (App. 23a) (emphasis added).

Judge Greene then found that the 1988 procurement violated these obligations by permitting U.S. flag service in the trade under conditions that would not have been permitted prior to the Treaty, thus compromising the pre-Treaty economic viability of the U.S. flag. *Id.* at 346-49 (App. 26a-32a). He found that a time charter may not be the only means in theory for protecting the economic viability of the U.S. flag, but it was the only practical means (*id.* at 348; App. 30a-31a); and the reasons advanced by the Navy for eliminating the

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[10] Under the second 1988 RFP: (1) there would be a requirement for at least one port call per month but the U.S. flag would not be required to commit the capacity needed to handle the larger cargo volume; and (2) breakbulk cargo could be accommodated on deck if covered by a tarpaulin. The full-time charter of the U.S. flag vessel would continue to be eliminated.

[11] "[W]ith every negative ruling, the government devised yet new and different means for eliminating the plaintiff from the United States-Iceland trade." 699 F. Supp. at 340 (App. 16a). Apart from the pretextual finding of excessive rates in 1985, those means included an effort to divert the cargo to military aircraft and an effort to undermine Rainbow's previously settled status as a small business. *Id.* at 341-42 (App. 17a-19a). All of this, including the record developed with respect to the 1988 procurement, led Judge Greene to conclude that "[t]he arrogance of power has seldom been displayed in more telling fashion" and "[t]his case presents a sorry saga of duplicity." *Id.* at 349 (App. 32a).

underdeck stowage, self-sustaining and similar requirements were pretextual. *Id.* at 348-49 (App. 30a-31a). Judge Greene ordered that these deficiencies be corrected in future procurements. *Id.* at 350 (App. 33a-34a). Rainbow operates under the 1987 contract (and the 1988 injunction) to this day.

The Court Of Appeals Opinion

On August 24, 1990 the Court of Appeals for the District of Columbia Circuit reversed and vacated the injunction. The opinion of the court of appeals finds that "[b]y its terms," the Treaty and MOU require only

> "(1) that the Navy award contracts by means of a competition; (2) in a manner that "ensure[s] that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade"; and (3) that the lowest U.S. bidder receive at least 35 percent of the cargo.

911 F.2d at 801 (App. 9a). The opinion further holds that "[a]mbiguous ratification history cannot be allowed to obscure the meaning of clear Treaty language" and that such language only obligated the Executive Branch to protect "the U.S.-flag service in general," not Rainbow in particular. *Id.* at 802 (App. 11a). Finally, the opinion holds that the manner in which the Navy implemented the Treaty and MOU in the 1987 RFP was not an indication of "what the Navy believed the Treaty to require, but only what it believed the Treaty to allow." *Id.*

REASONS FOR GRANTING THE PETITION

Summary Of Reasons

The opinion of the court of appeals decides an important question of federal law in a way that conflicts with the applicable decisions of the Court.

1. The opinion contravenes the principle, most recently restated in *United States v. Stuart*, 109 S. Ct. 1183 (1989), that extra-textual sources are useful and necessary tools of treaty construction. By declaring that the language of the Treaty and MOU is "clear" - a

contention that had not been raised since the initial hearing before Judge Greene when the Government conceded ambiguity - the opinion bootstraps a nonintentionalist approach to treaty construction onto a pair of treaty documents which could not be more ambiguous. The opinion sets such a low and unprecedented standard for clarity in a treaty that it creates the opportunity for virtually unfettered Executive Branch discretion in reinterpreting treaty obligations. This would render superfluous the Senate's advice and consent role in treaty-making under Article II, §2, cl. 2 of the U.S. Constitution.

The opinion observes that "[a]mbiguous ratification history cannot be allowed to obscure the meaning of clear Treaty language." There is no dispute with that statement as a generalization, but there have been few treaty obligations of the United States so "clear" that extratextual sources could be ignored. It is the essence of a treaty that things are left unsaid or unclear. If the courts suddenly find "clarity" in words and phrases that are as imprecise as other words and phrases in the same treaty, the nonintentionalist, textualist approach will take the field by default and *Stuart* and the long line of precedent behind it will have been overruled.

2. The record developed at the ratification hearing was remarkably pointed. The Treaty was ratified solely because of State Department representations that the purpose and effect of the Treaty and the MOU were to preserve and protect the class of U.S. flag vessels previously carrying the military cargo under the 1904 Preference Act. Judge Greene held the Navy's 1988 procurements only to those standards set forth in the Report of the ratification hearing: (1) that "the treaty will be implemented in such a way that the existing United States-flag service in the Iceland trade would not be disadvantaged as a result of the treaty"; and (2) that "the economic viability of the United States flag service will be maintained just as if the 1904 Act were fully in effect in the Iceland trade." 699 F. Supp. at 344 (App. 23a). The opinion's characterization of this history as "ambiguous" is as unfounded as its conclusion that the Treaty and MOU are "clear."

3. The opinion's characterization of the initial implementation of the Treaty and MOU by the Navy at the time of ratification as "not what the Navy believed the Treaty to require, but only what it believed the Treaty to allow" is completely without basis in the record. This

characterization is based on a *post hoc* affidavit prepared for the 1988 litigation. The record shows that the Navy recognized its responsibility to proceed as it did in the initial procurement at the time the Treaty was ratified.

The Treaty And MOU Are Ambiguous

1. The finding that the Treaty and MOU are unambiguous was probably as much of a surprise to the Government as it was to Rainbow and the MM&P. While the Government's position on the meaning and effect of the ratification history has vacillated at each stage of the litigation, its position concerning the clarity of the Treaty and MOU has remained constant since the T.R.O. hearing: the MOU, which implements the Treaty, "is unclear in many ways" and "is not a model of clarity; I am perfectly willing to agree with that." JA 401-02 (remarks of Government counsel).

The Treaty, after taking into account the past market shares of the U.S. flag and Icelandic companies, requires periodic competitions which will assure both flags "a viable presence in the trade." Treaty, Art. I (App. 2b). The MOU is then designated as the vehicle for achieving those objectives. The MOU creates the 65/35 market division and further provides that if the U.S. flag gets the 35% share it shall be permitted a "fair rate that adequately covers the carrier's costs, assuming normal efficiencies of operation, plus a reasonable profit." MOU, Par. 1 (App. 4b).

"Viable presence" and "normal efficiencies of operation" are hardly precise terms.[12] This language can lend itself to a variety of meanings, including most logically the meaning urged by Petitioners herein. The opinion concludes that the "plain" meaning of this language amounts to no more than a requirement that the cargo be split on a 65/35 basis without any other considerations, that this is adequate to protect the U.S. flag "as a whole." The opinion fails to recognize the basic problem which the "economic viability" language creates. How can it be that a U.S. flag ship operated at full capacity when it

[12] For example, although the Court has long had an "economic viability" test for Fifth Amendment attacks on zoning ordinances and similar enactments, "the precise meaning of 'economically viable use' of land is elusive and has not been clarified by the Supreme Court." *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1987), *cert. denied*, 488 U.S. 827 (1988).

was carrying approximately two-thirds of the military cargo would not be put at a severe economic disadvantage by being allowed to carry only 35% of that cargo? The answer is that the maintenance of "economic viability" requires affirmative Government measures to vitiate the economic and competitive disadvantage a reduction in cargo would cause.

Reasonable people may differ on what is the "plain" meaning of these agreements. That is precisely the point overlooked by the opinion. It is the existence of a reasonable disagreement over that meaning which compels resort to the context in which the agreements were created.

2. The Court has made it clear that treaties differ from ordinary contracts between private parties and must be interpreted differently. "[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations and the practical construction adopted by the parties." *Air France v. Saks*, 470 U.S. 392, 396 (1985) (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-432 (1943)). A rigid, textualist approach to treaty interpretation has been rejected by the Court[13] and by the Restatement.[14]

The cases relied upon in the opinion for a "plain meaning" approach are not to the contrary. In both *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), and *Maximov v. United States*, 373 U.S. 49 (1963), the issue involved the meaning of treaty language as detailed in the "Definitions" section of each document. The language could not have been clearer, and in each instance the context

[13] A treaty must be construed consistent with the intent and expectations of the parties. *Georgia v. South Carolina*, 110 S. Ct. 2903, 2916 (1990); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988); *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 163 (1940) ("Even where a provision of a treaty fairly admits of two constructions . . . the more liberal interpretation is to be preferred.").

[14] "An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose." Restatement (Third) of the Foreign Relations Law of the United States §325(1) (1987). This reflects the "strong tendency in United States law to reject literal-minded interpretation." It also acknowledges that "in United States tradition the primary object of interpretation is to 'ascertain the meaning intended by the parties'; 'the ordinary meaning of the words of the agreement' is a factor to be taken into account, as are the preparatory materials." *Id.* (Reporters' Note 4).

failed to support a different meaning. Contrast this with a more recent case, *O'Connor v. United States*, 479 U.S. 27 (1986), in which the Court was presented with language of the Panama Canal Treaty which stated that employees of the Panama Canal Commission "shall be exempt from any taxes." *Id.* at 29. The Eleventh Circuit, finding that it was bound by the plain meaning of this provision, held that the exemption extended to U.S. income taxes. *Harris v. United States*, 768 F.2d 1240, 1243 (11th Cir. 1985), *vacated*, 479 U.S. 957 (1986). The Court disagreed, finding that the treaty language was "subtle" and that the overall context of the treaty and its implementation by the Executive Branch indicated that the exemption applied solely to taxes imposed by the Government of Panama. *O'Connor*, 479 U.S. at 30-33.

3. It is difficult enough to find plain meaning in a statute.[15] In the context of a treaty or international agreement, a court is confronted with language that has been filtered through the murky lens of a diplomatic negotiation involving people from different legal cultures. For this reason, a treaty or other international agreement does not lend itself readily to the quick fix of a plain meaning construction. The distinction is as much constitutional as it is practical. The advice and consent role of the Senate in treaty-making under Article II, §2, cl. 2 of the U.S. Constitution exists at least in part for the purpose of creating a public record of what the Executive Branch thought it was accomplishing in the otherwise secret negotiating process. *Stuart*, 109 S. Ct. at 1192 n.7. Unless the Executive Branch and the Senate share a common understanding of the treaty, the Senate's constitutional role is frustrated and its participation in treaty-making is pointless.

The opinion, if permitted to stand, will create ample opportunity for future judicial frustration of the Senate's constitutional role. By giving one meaning out of several to the Treaty and MOU, and by calling that meaning "clear," the opinion renders meaningless the entire ratification process. Further, by carrying a nonintentionalist, textualist approach to an unwarranted extreme, the opinion creates a conflict with *Stuart* and the long line of precedent behind it.

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[15] That reasonable people can differ on even the plainest meaning of a statute can best be seen in the dissent (per Scalia) to the recent decision in *Moskal v. United States*, 59 U.S.L.W. 4025, 4029-30 (Dec. 3, 1990).

The Meaning Of The Treaty And MOU Are Clarified By The Record Of Senate Ratification

1. Although the Government took several inconsistent positions before the district court on the relevancy of the ratification record,[16] its last and most correct position was that "authoritative Executive branch representations concerning the meaning of a Treaty which form part of the basis upon which the Senate gives advice and consent are entitled to be accorded binding weight as a matter of domestic constitutional law." 699 F. Supp. at 343 (App. 21a) (cited in *Stuart*, 109 S. Ct. at 1196-97 (Scalia, J., concurring)). This is no more than a recognition of the relevancy of "[n]ontextual sources that often assist us in 'giving effect to the intent of the parties.'" *Stuart*, 109 S. Ct. at 1191 (citing *Sumitomo*, 457 U.S. at 185).

2. The opinion, its view distorted by the imagined "clarity" of the Treaty and MOU, pays scant attention to the ratification record. The court concludes, without discussion, that the record is "ambiguous" and fails to support a contention that the Treaty and MOU protected Rainbow's class of vessel and the economics of the pre-Treaty service. 911 F.2d at 802 (App. 11a). The best rebuttal is the remarkably pointed record of ratification. As the district court noted, the ratification hearing plainly was intended to fill in the considerable gaps in the text of the Treaty and MOU. 699 F. Supp. at 343 (App. 21a-22a). Counselor Derwinski went out of his way repeatedly to assure the Senate that no existing U.S. interests would be hurt by the compromise and that Rainbow itself had been involved in framing the compromise.

3. The crucial language in the Senate Foreign Relations Committee Report was prepared before the hearing and endorsed at the hearing by Counselor Derwinski. Paraphrasing, that language defined the purpose and effect of the Treaty and MOU as (1) maintaining the "economic viability" of U.S. flag service "just as if the 1904 Act were fully in effect in the Iceland trade" and as (2) not putting the "existing United States-flag" service at a "disadvantage" as a result of the Treaty. This was not speculation on the part of Counselor Derwinski

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[16] At an early stage in the proceeding, the Government took the position that the representations made by the Department of State and the Navy to the Senate during the ratification hearing were merely "precatory." 686 F. Supp. at 357 n.17 (App. 42a).

as to what the negotiators intended nor was it a statement of future policy. It was the explicit, highly authoritative pronouncement of the Executive Branch as to what the Treaty and MOU mean.

The statements in the report and the questions to Counselor Derwinski were not about U.S. flag service in general but about the *existing* operator, Rainbow, reflecting the concern of both the Executive Branch and the Senate as to the ability of the *existing* U.S. flag service to continue in an economically viable way which would not be diminished by the treaty. The Senate was not seeking meaningless assurances. It wanted to know what the agreements actually *meant*. As the district court found, it is this meaning which inescapably binds the U.S. Government to an implementation which protects Rainbow's class of vessel and the pre-Treaty economics of the service. 699 F. Supp. at 346-47 (App. 27a-29a). Anything less would disadvantage the "existing United States-flag" service, which would not achieve the level of economic viability it would have otherwise enjoyed "just as if the 1904 Act were fully in effect in the Iceland trade" and the U.S. flag were carrying approximately two-thirds of the military cargo.

The Meaning Of The Treaty And MOU Are Further Clarified By The Initial Executive Branch Implementation

1. "'[A]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.'" *Stuart*, 109 S. Ct. at 1193 (quoting *Sumitomo*, 457 U.S. at 184-85, and citing *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)). That is particularly so where, as here, the implementation by the Executive Branch is contemporaneous with the treaty-making process.

2. The 1987 RFP followed the meaning of the Treaty and MOU by (1) offering the U.S. flag a full-time charter of its vessel and (2) by requiring, *inter alia*, that the vessel be self-sustaining and have below-decks storage capacity. These provisions put the U.S. flag in precisely the economic and operational position it would have enjoyed had the Treaty and MOU not been in effect and the procurement were still governed by the 1904 Preference Act. The opinion's response to this is to ignore it:

> The Navy asserts, and Rainbow provides no basis for doubting, that it included the requirements of the 1987 RFP only because it then thought that it could use the RAINBOW HOPE under a time charter, in non-Icelandic trades, and not because the Treaty required it to use those terms. Therefore, the inclusion of the specifications in the RFP for 1987 indicates not what the Navy believed the Treaty to require, but only what it believed the Treaty to allow.

911 F.2d at 802 (App. 11a).

There is absolutely no basis in the record for this conclusion. The district court found that the 1987 RFP was highly relevant to the meaning of the Treaty and MOU. Noting that the contested provisions in the second 1988 RFP "had never been part of any procurement with respect to the Icelandic trade" (699 F. Supp. at 344; App. 24a) and that nothing had changed since 1987, the district court made a specific finding that the Government's efforts to disavow the conditions of the 1987 procurement were "mere pretext." *Id.* at 345 (App. 24a). The factual basis for this finding was developed through extensive discovery. Discovery revealed that contemporaneous with the ratification process in late 1986, Navy officials determined that the U.S. flag service in the Iceland trade under the Treaty would require a time charter and a vessel with self-sustaining capability and substantial below-decks storage. On the other hand, the Government's argument that the 1987 RFP was a temporary frolic was predicated entirely on *post hoc* rationalizations contained in an affidavit submitted in 1988 by a Navy operations officer, rationalizations which were belied by internal Navy documents.[17] The record stands unchallenged: the 1987 RFP represents the considered, contemporaneous understanding of the Navy as to what the Treaty and MOU require with respect to U.S. flag service. It is the same understanding which ran through the Senate ratification process, and it is the understanding which the district court enforced when it issued the permanent injunction:

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[17] The factual record on this question is detailed at pages 40-43 of the Brief For U.S. Merchant Marine Appellees [Rainbow and the MM&P] below. Contrary to the court of appeals' assertion that "Rainbow provides no basis for doubting" the Navy's position on this question (911 F.2d at 802; App. 11a), Rainbow and the MM&P devoted considerable effort to litigating and briefing this issue in both courts below.

> The maintenance of the "current carrier's" economic viability was a central condition in the ratification of the Icelandic treaty; it plainly is violated by a change in the customary economic environment of the Icelandic trade in the wake of the treaty so as to undermine that carrier's ability to exist.
>
> This does not mean, as the government would have it, that Rainbow claims or must be given a "property right" in the Iceland military cargo trade or that the Navy is forbidden ever to vary the terms of the contracts. What it does mean, however, is that the Navy, having proceeded for years on the basis of a certain pattern of awarding Icelandic cargo contracts pursuant to the 1904 Act, could not, as soon as the treaty took effect, drastically change that pattern in a number of ways, each of which has the effect, and probably the purpose, of making it impossible for Rainbow to participate in that trade on a basis that leaves it economically viable. What it also means is that Rainbow may not be subjected to requirements that are different and that leave it worse off than it was under the Cargo Preference Act prior to the signing of the treaty.

699 F. Supp. at 347 (App. 28a) (footnotes omitted).

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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January 3, 1991

APPENDIX A

RAINBOW NAV., INC. v. DEPARTMENT OF NAVY
Cite as 911 F.2d 797 (D.C. Cir. 1990)

RAINBOW NAVIGATION, INC., et al., Appellees,

v.

DEPARTMENT OF the NAVY, Appellant.

Nos. 89-5019, 89-5020.

United States Court of Appeals,
District of Columbia Circuit.

Argued March 6, 1990.
Decided August 24, 1990.

The United States District Court for the District of Columbia, 699 F.Supp. 339, Harold H. Greene, J., enjoined the way in which the Navy sought to implement the terms of an agreement between United States and Iceland concerning the allocation, as between American and Icelandic companies, of the military cargo trade between the two countries, and appeals were taken. The Court of Appeals, D.H. Ginsburg, Circuit Judge, held that: (1) a treaty and memorandum of understanding dealing with military cargo trade between United States and Iceland did not vest any rights in the current United States flag carrier above the rights of the United States flag service as a whole and therefore imposed no obligation upon the government specifically to ensure economic viability of current United States flag carrier, did not protect current flag carrier from competition of other classes of United States flag carriers, or require restrictive physical specifications, and (2) Navy's revised request for proposals was not inconsistent with treaty on memorandum of understanding dealing with military cargo trade between United States and Iceland.

Reversed.

1. Shipping 13
Treaties 8

A treaty and memorandum of understanding dealing with military cargo trade between United States and Iceland did not vest any rights in the current United States flag carrier above the rights of the United States flag service as a whole and therefore imposed no obligation upon the government specifically to ensure economic viability of current United States flag carrier, did not protect current flag carrier from competition of other classes of United States flag carriers, and did not require restrictive physical specifications.

2. Treaties 7

Clear import of treaty language controls analysis of treaty unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.

3. Treaties 7

Ambiguous ratification history cannot be allowed to obscure meaning of clear treaty language.

4. Shipping 13
Treaties 8

Navy's revised request for proposals was not inconsistent with treaty on memorandum of understanding dealing with military cargo trade between United States and Iceland.

Appeal from the United States District Court for the District of Columbia (CA 88-00992).

John P. Schnitker, Atty., Dept. of Justice, with whom Stuart M. Gerson, Asst. Atty. Gen., Jay B. Stephens, U.S. Atty., and Leonard Schaitman, Atty., Dept. of Justice, Washington, D.C., were on the brief for appellant Dept. of the Navy in 89-5019.

Joanne W. Young, New York City, with whom David E. Short, Washington, D.C., was on the brief for appellant Iceland Steamship Co., Ltd. in 89-5020.

Frank J. Costello, Jr., with whom Benjamin L. Zelenko, Washington, D.C., was on the brief for appellees Rainbow Navigation, Inc. and International Organization of Masters, Mates & Pilots in 89-5019 and 89-5020.

Before RUTH BADER GINSBURG, D.H. GINSBURG, and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge D.H. GINSBURG.

D.H. GINSBURG, Circuit Judge:

Rainbow Navigation, Inc. challenged, and the district court enjoined, the way in which the Navy seeks to implement the terms of an agreement between the United States and Iceland concerning the allocation, as between American and Icelandic companies, of the military cargo trade between the two countries. *Rainbow Navigation, Inc. v. Department of the Navy*, 699 F.Supp. 339 (D.D.C.1988). The agreement, which is embodied in a Treaty and a Memorandum of Understanding (MOU), requires the Navy to hold a competition among U.S.-flag and Icelandic carriers, and guarantees to merchant mariners of each country a minimum share of that trade.

The district court concluded, based upon statements made by officials of the Executive Branch during ratification proceedings in the Senate, that "the treaty vested [certain] rights in the 'current carrier,' *i.e.*, Rainbow." *Id* at 345. In order to ensure that the Government does not violate those rights, the court (1) enjoined it from imposing conditions upon the competition that "leave [Rainbow] worse off than it was . . . prior to the signing of the treaty," *id.* at 347; and (2) ordered it to "structure the competition to include a time charter

arrangement or some other means equally effective to ensure [Rainbow's] continued economic viability," *id* at 350.

We reverse the judgment and vacate the injunction issued by the district court. Nothing in the Treaty or the MOU, either on their faces or as illuminated during the ratification proceedings, vests any rights in Rainbow, as opposed to the U.S.-flag service generally, or requires the time charter or the other conditions that the district court imposed. In light of this result, we need not address the objections to the injunction that appellant-intervenor Iceland Steamship Co. (Eimskip) raises; we do, however, address, and find wanting, Eimskip's objections to the conditions that the Navy imposed upon the competition.

I. BACKGROUND

Rainbow Navigation operates the M/V RAINBOW HOPE, which in 1984 became the first U.S.-flag vessel since the late 1960s to carry cargo to a U.S. military base in Iceland. As a U.S.-flag vessel, it was able to take advantage of the Cargo Preference Act of 1904,10 U.S.C. § 2631, which reserves the transportation of U.S. military cargo to U.S.-flag vessels to the extent "that the freight charged by those vessels is [not] excessive or otherwise unreasonable." The Military Sealift Command (MSC) awarded to Rainbow cargo transportation contracts representing 70% of the U.S. military cargo bound for the base at Keflavik – which is the full amount that Rainbow is capable of carrying – and to that extent displaced the Icelandic carriers it had previously used.

The resulting disruption in the longstanding trade relationship between the MSC and the Icelandic companies, such as Eimskip, led to friction in the diplomatic relationship between the United States and Iceland. This friction apparently induced the United States to make several unsuccessful attempts to restore to the Icelandic companies a larger share of the military cargo trade between the two allies. *See* 699 F.Supp. at 340-41.

The situation was eventually addressed in the September 1986 Treaty Between the United States of America and the Republic of Iceland to Facilitate Their Defense Relationship. Article I of the Treaty provides:

> Transportation services for cargo transported by sea between Iceland and the United States for purposes of the Defense Agreement shall be provided by vessels of the United States and vessels operated by Icelandic shipping companies on the basis of competition between United States flag carriers and Icelandic shipping companies pursuant to this Article. Any such competition shall result in contract awards that ensure that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade. To ensure achievement of these objectives, the percentage of cargo transported by sea for purposes of the Defense Agreement that is allocated between vessels operated by Icelandic shipping companies and vessels of the United States on the basis of such competition shall be determined by agreement between the United States and Iceland.

The simultaneously executed MOU implements the Treaty by calling for periodic competitions between U.S.-flag carriers and Icelandic shipping companies:

> Each competition shall result in contract awards to both an Icelandic shipping company and a United States flag carrier such that not to exceed 65 percent of the cargo shall be carried by the lowest bidder and the remainder shall be carried by the next lowest bidder of the other country....

The Treaty and the MOU thus create an exception to the nearly absolute preference that U.S.-flag carriers enjoy under the Cargo Preference Act; they guarantee Icelandic shipping companies a minimum 35% share of the military cargo trade between the United States and Iceland, and provide them with an opportunity to compete for up to 65% of that trade.

During ratification hearings before the Senate Committee on Foreign Relations, Senator Mathias asked Edward J. Derwinski, Counselor to the State Department, what effect the Treaty would have on the "current American flag carrier"; he inquired, in particular, whether there are "any plans in effect to save harmless the current cargo carrier." Counselor Derwinski answered that

> the current carrier has been involved in a number of discussions with appropriate authorities, and despite the fact that we could not provide, obviously, within the treaty for specific protection for an entity, we did have in mind at all times the need to protect the interests of the current carrier.

The Committee Report on the Treaty, the pertinent part of which Counselor Derwinski had reviewed and endorsed, recommended ratification

> only with the assurances of the Departments of State and Defense that ... the treaty will be implemented in such a way that the existing United States-flag service in the Iceland trade would not be disadvantaged as a result of the treaty. The committee received those assurances at its hearing, and recommends advice and consent on that basis only.

The report further stated that "[t]he Committee understands and expects that the economic viability of the United States-flag service will be maintained as if the 1904 Act were fully in effect in the Iceland trade." S.Exec.Rep. No. 27, 99th Cong., 2d Sess. 3 (1986).

In 1987, the Navy held the first competition under the Treaty for the award of shipping contracts. In its Request for Proposals (RFP), it invited Icelandic bidders to submit alternative bids based upon carriage of the 65% and the 35% shares of the cargo; U.S. bidders, in contrast, were to submit bids for carrying 65% of the cargo (calculated per ton), and alternatively for a "time charter" (calculated per diem), under which the ship and crew would be available, when not carrying the 35% share of the military cargo to Iceland, "to meet other requirements of the Government on a worldwide basis" during the contract period. Among other specifications, the Navy required that a bidding vessel provide at least 90,000 cubic feet of underdeck stowage capacity and carry its own cranes on board for unloading; the time charter would be conducted as a small business set-aside. Rainbow, the only U.S.-flag carrier to participate, was underbid by an Icelandic competitor, which therefore secured the larger share of the contract. Rainbow entered into the time charter, to be used for carriage of the remaining 35% share and for service, as required, to other destinations.

In its RFP for 1988, the Navy included terms substantially different from those of the 1987 procurement. Bidders were to compete separately for the 65% and 35% shares. Bidders for only the smaller share would thus no longer be required to provide space sufficient to carry 65% of the trade. The Navy also eliminated the time charter feature and the small business set-aside for the U.S. carrier; it further deleted various physical specifications, including cranes and underdeck stowage capacity, for bidders from both countries.

Instead of submitting a bid, Rainbow brought this suit in district court, claiming that the changes violated the terms of the Treaty and the MOU because they threatened to undermine Rainbow's economic viability. In April 1988, the district court issued a temporary restraining order, and in May a preliminary injunction, barring the Navy from implementing the procurement. The court also directed Rainbow and intervenor Eimskip to continue transporting the Iceland cargo under the terms of the 1987 competition.

Both Rainbow and the Navy moved for summary judgment. The Navy's motion was based upon a proposal to revise the RFP for 1988. It offered to hold a single competition, in which all bidders would be required to have the capacity to carry 65% of the Iceland cargo. It also offered to survey the "universe of potential bidders" and to conduct the competition, as it had in 1987, as a small business set-aside if, as required by regulation, there was "a reasonable expectation that ... offers will be obtained from at least two responsible small business concerns ... at fair market prices." 48 C.F.R. ch. 1, § 19.502-2(a). The Navy continued to oppose a time charter arrangement, as well as the imposition of restrictive specifications for the vessel or vessels to be used.

In November 1988, the district court granted summary judgment for Rainbow, holding that the 1988 RFP, in both its initial and newly proposed versions, violated the terms of the Treaty and the MOU. Based largely upon the above-quoted colloquy between Senator Mathias and Counselor Derwinski, the court held that the Government is required to guarantee, and the RFP threatened to undermine, Rainbow's economic viability, and that the Navy could not structure the competition so as to leave Rainbow in a worse position than it was in prior to the advent of the Treaty.

The court then imposed a number of specifications for the conduct of future procurements, which it deemed necessary in order to satisfy the requirements of the Treaty and to safeguard against further Navy efforts, as the court saw them, to dishonor the Government's representations to the Senate by "put[ting Rainbow] out of business." 699 F.Supp. at 349. The court permanently enjoined the Navy: to set aside future competitions for small business; to require that bidders have the capacity to carry at least 65% of the Iceland trade (thereby preventing small U.S. "supply boats" from competing for the 35% share of the trade); and to provide a time charter or "some other means equally effective to ensure that the continued economic viability of [Rainbow] is maintained as if the Cargo Preference Act of 1904 were fully in effect." *Id.* at 350. In the accompanying opinion, the court also said that future solicitations should specify underdeck stowage, and intimated that the Navy's reasons for abandoning the crane requirement are unconvincing. *Id.* at 348-49. Both the Navy and Eimskip filed timely appeals.

II. THE NAVY'S APPEAL

[1] The Navy contends that the court erred in requiring it to frame the competition in a way that will ensure Rainbow's economic viability, as opposed to the economic viability of U.S.-flag service generally, and that, even if Rainbow's viability must be assured, a time charter is unnecessary to that end. The Navy also argues that the Treaty neither entitles Rainbow to insulation from domestic competition, nor requires the imposition of conditions upon the competition in order to serve that purpose. Finally, the Navy challenges the district court's insinuation that it acted in bad faith when it specified new terms for the 1988 RFP.

Rainbow disavows any legal claim to an unconditional right to economic viability, arguing instead that it is entitled to compete "as if the 1904 Act, pre-Treaty market conditions were in effect." Based primarily upon the Executive's representations, Rainbow contends that the Treaty protects it from competition by any U.S.-flag vessel other than one of that "class and type ... that could meet the pre-Treaty conditions in the trade." Rainbow thus concludes that the Navy must include certain restrictive specifications in its RFP that will disqualify

smaller, domestic supply boats from bidding for the MSC's Iceland trade. It also concludes that the Navy must include a time charter provision in order to ensure that Rainbow will fully recover its fixed costs of operating a vessel capable of carrying 65% of the Iceland cargo. (According to Rainbow, "[t]his means that the U.S. flag is to be paid for the 65% share even though it is carrying the lesser amount of cargo [*ie.*, 35%].")

[2] Our analysis "must, of course, begin with the language of the Treaty itself." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S.Ct. 2374, 2377, 72 L.Ed.2d 765 (1982).

> The clear import of treaty language controls unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."

Id. (quoting *Maximov v. United States*, 373 U.S. 49, 54, 83 S.Ct. 1054,1057,10 L.Ed.2d 184 (1963)). By its terms, the Treaty and the MOU require only (!) that the Navy award contracts by means of a competition; (2) in a manner that "ensure[s] that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade"; and (3) that the lowest U.S. bidder receive at least 35 percent of the cargo.

The Treaty protects the United States-flag service as a whole, therefore, rather than any particular carrier. Indeed, Counselor Derwinski stated as much when, in response to the question of whether the Treaty protects the "current American flag carrier," he said that the Government "could not provide ... within the Treaty for specific protection for an entity." The Committee report accepted his distinction, reporting only that "the Treaty will be implemented in such a way that the existing United States-flag service ... would not be disadvantaged." *See also* 132 Cong. Rec. 29,521 (1986) (Senator Pell reporting that the Administration had "assured the committee that the treaty will be implemented in such a way that the existing United States-flag service in the Iceland trade would not be disadvantaged").

Because the Treaty protects the survival of the U.S.-flag service as a whole, it imposes no obligation upon the Government specifically to ensure Rainbow's economic viability by, for example, offering it a time charter, or guaranteeing it payment for carrying 65 percent of the

cargo even when it carries only 35 percent. Perhaps if it appeared that the trade would not otherwise be economically viable for any domestic carrier, then Rainbow would be entitled to such consideration, but Rainbow has made no such allegation. Indeed, in the course of defending the court-imposed requirement that the Navy conduct the procurement as a small business set-aside, which requires that there be at least two expected bidders, Rainbow expressly represents that there is "at least one [other] U.S. flag company that was actually operating a sister ship of the M/V RAINBOW HOPE and that had expressed an interest in bidding." Moreover, the district court's finding that if companies are permitted to bid for the 35% share without committing enough space for the 65% share, then Rainbow would face competition from smaller supply boats, clearly indicates that the presence of U.S. carriers in the Iceland trade does not depend upon Rainbow's participation. The district court's potentially off-setting finding that "[o]nce Rainbow was eliminated, the small supply boat operators could be expected to depart," 699 F.Supp. at 348, again leaving no U.S.-flag carrier to take the 35 percent share, is without support—at least once it is clear, as it is to us (see below), that the Navy is not acting in bad faith.

Similarly, nothing in the language of the Treaty or the MOU protects Rainbow from the competition of other classes of U.S.-flag carriers, or requires the restrictive physical specifications that the district court imposed. The MOU clearly contemplates that there might be competition among U.S. carriers, and it guarantees a share of the cargo only to the lowest U.S. bidder, not to the lowest bidder in the particular class of vessel to which the RAINBOW HOPE belongs.

Because the Treaty and the MOU do not expressly support its position, Rainbow, like the district court, relies primarily upon the statements made or endorsed by the Executive Branch during the ratification proceedings. It argues that those statements are binding interpretations of the Treaty, and that, so interpreted, the Treaty requires the Government to assure Rainbow's viability and to leave it in no worse condition than it was in before the advent of the Treaty regime.

First, we are by no means convinced that the specific representations made by the Executive in this case are interpretations of

what the Treaty requires, as opposed merely to representations about how the Administration then intended to implement the Treaty. Because neither appellant has pressed this point, however, we assume *arguendo* that the Executive's statements during the ratification process are relevant guides to interpretation of the Treaty.

[3] Second, we do not accord those statements the same import that Rainbow does. Neither the remarks by Counselor Derwinski, nor the Committee Report quoted above, clearly indicates that the Executive Branch believed that it was obligated to protect Rainbow or Rainbow's class of vessel in particular, as opposed to the U.S.flag service in general. Ambiguous ratification history cannot be allowed to obscure the meaning of clear Treaty language. And, as discussed above, it is clear that the language of the Treaty confers no rights particularly upon Rainbow or its class of vessels.

[4] Nor is there merit to Rainbow's argument that the Navy's first approach to implementing the Treaty, *ie.*, the 1987 RFP, with its restrictive physical specifications, reflects the Navy's contemporaneous interpretation of what the Treaty requires, and as such commands the special deference of the court, *see Air Canada v. U.S. Dep't of Transp.*, 843 F.2d 1483, 1486-87 (D.C.Cir.1988). The Navy asserts, and Rainbow provides no basis for doubting that it included the requirements of the 1987 RFP only because it then thought that it could use the RAINBOW HOPE under a time charter, in non-Icelandic trades, and not because the Treaty required it to use those terms. Therefore, the inclusion of the specifications in the RFP for 1987 indicates not what the Navy believed the Treaty to require, but only what it believed the Treaty to allow. The elimination of those restrictive specifications from the RFP for 1988 is not a departure from the Navy's previous interpretation, but merely a reflection of what else, in the Navy's view, the Treaty permits.

We are also unable to uphold the district court's requirement that "any competition for the United States-Iceland cargo trade shall be conducted as a small business set-aside." 699 F.Supp. at 350. The court gave no indication of why it imposed this requirement apart from its general determination to preserve the status quo as of 1987, the Navy's departure from which it perceived as being in bad faith. In light of the analysis in the preceding paragraph, however, that perception must be

deemed erroneous. Moreover, neither the Treaty nor the MOU requires a small business set-aside, and Rainbow points to nothing else that could justify the district court's ordering it, apparently without regard to whether the multiple bidder condition of 48 C.F.R. ch. 1, § 19.502-2(a) is satisfied.

Finally, we note that the Navy has not implemented the Treaty in a manner that makes it impossible or even difficult for Rainbow to qualify as a bidder for the procurement. The likely effect of the Navy's decision to jettison the time charter and restrictive specifications of the 1987 RFP is only to expand the field of participants. The danger cited by Rainbow, and by the district court, is not that the U.S. presence in the Iceland trade will be entirely eliminated, but rather that domestic competition will edge Rainbow out of the Iceland trade and lead to its replacement by a lower-bidding U.S. carrier. As we have seen, this is not a danger from which Rainbow is entitled to be protected.

III. EIMSKIP'S APPEAL

Eimskip challenges the district court's failure to include in its injunction provisions designed to minimize the adverse effects that a time charter might otherwise have upon Eimskip's ability to compete with Rainbow, and its inclusion of the requirement that the vessel have its own cranes. Both points are rendered moot by our holding that the district court lacked authority to impose any conditions.

Regarding Eimskip's objection to the Navy's substituting Njardvik for Reykjavik as the principal site for unloading cargo, the carrier has not shown that the change threatens the economic viability of the Icelandic presence in the trade. Thus, Eimskip has failed to make out any inconsistency between the revised RFP and the terms of the Treaty or the MOU. Insofar as Eimskip's objection is based upon 10 U.S.C. § 2305(a), it is utterly without merit.

IV. CONCLUSION

Nothing in the revised 1988 RFP is inconsistent with the requirements of the Treaty or the MOU. We therefore vacate the order of the district court, and hold that the Government is free to implement the procurement as proposed. For the reasons stated above, the judgment of the district court is

Reversed.

699 F. SUPP.339 (D.D.C. 1988)

RAINBOW NAVIGATION, INC., et al., Plaintiffs,

v.

DEPARTMENT OF the NAVY, et al., Defendants.

Civ. A. No. 88-0992 (HHG).

United States District Court,
District of Columbia.
Nov. 15, 1988.

United States flag-carrier brought suit against Navy seeking injunctive relief against Navy's alleged violation of United States-Icelandic treaty regarding transport of United States military cargo in issuing new procurement requirements. Carrier moved for summary judgment, and Navy moved to dismiss and for partial summary judgment. The District Court, Harold H. Greene, J., held that: (1) carrier's suit against Navy was not mooted by Navy's purported acquiescence in earlier judicial decision requiring a single competition for transport rights; (2) Navy was bound by two undertakings made by executive branch during Senate ratification process of treaty, to effect that existing United States-flag service in Icelandic trade would not be disadvantaged as result of treaty and that economic viability of that service would be maintained; (3) proposed alterations in procurement requirements for contracting violated undertakings; and (4) carrier was entitled to permanent injunction prohibiting implementation of procurement measures adopted by Navy.

Ordered accordingly.

1. Federal Courts 13

United States flag-carrier's suit against Navy challenging request for proposals for transport of military cargo to Iceland as being in violation of United States-Iceland treaty was not mooted by Navy's

apparent acquiescence in earlier judicial decision requiring single competition for transport rights, where basic controversy between parties regarding Navy compliance with treaty was alive and, in view of Navy's past efforts to exclude carrier, Navy was likely to repeat its unlawful conduct in absence of injunctive relief.

2. Treaties 8

Executive branch representations to Senate concerning meaning of treaty which formed part of basis of Senate's advise and consent were binding on government in litigation concerning Navy's compliance with United States-Iceland treaty regarding competition for transport of military cargo to Iceland.

3. Treaties 8

United States-Iceland treaty regarding transport of the United States military cargo to Iceland contains two undertakings based on representations of the executive branch made to Senate during ratification process, to effect that existing United States flag service in Icelandic trade will be disadvantaged as result of treaty and that economic viability of that service will be maintained just as if Cargo Preference Act stood fully in effect with respect to trade. 10 U.S.C.A. § 2631.

4. Treaties 8

Navy was not required to seek most economical means of transporting military cargo to and from Iceland but was instead required to depart from that standard as consequence of United States treaty with Iceland and undertakings made to Senate during ratification process including representation that existing United States flag-carrier was not to be disadvantaged as result of treaty.

5. Treaties 8

Navy was bound as result of ratification of process of United States-Icelandic treaty governing carriage of United States military cargo to and from Iceland not to disadvantage existing United States flag-carrier and could not alter procurement requirements for cargo carrier in manner which had effect and, most probably purpose, of

making it impossible for carrier to participate in that trade on basis which it left it economically viable.

Karen Hastie Williams, Clifton S. Elgarten, Stuart H. Newberger, Crowell & Moring, Washington, D.C., for plaintiff Rainbow Navigation, Inc.

Jeffrey Hunter Moon, Asst. U.S. Atty., Washington, D.C., for defendants; Richard Haynes, Dan Wentzell, Military Sealift Command, of counsel.

Benjamin L. Zelenko, Martin Shulman, Landis, Cohen, Rauh & Zelenko, Washington, D.C., for intervenors Intern. Organization of Masters, Mates and Pilots.

Joanne W. Young, David E. Short, Michael G. Roberts, Lord, Day & Lord, Barrett Smith, Washington, D.C., for Iceland S.S. Co., Ltd. "EIMSKIP".

MEMORANDUM

HAROLD H. GREENE, District Judge.

This case, which involves shipping between the United States and Iceland, is now before this Court for the fourth time in three years. On the first three occasions, the Court concluded that the government's legal position was erroneous, its factual statements at odds with the facts, or both. As discussed below, with every negative ruling, the government devised yet new and different means for eliminating the plaintiff from the United States-Iceland trade. The Court now holds that the Executive's latest action has no more validity than its three previous efforts.

I

Plaintiff, Rainbow Navigation, Inc., is a United States shipping company which prior to the events described herein had carved out for itself a small niche in the military cargo trade between this country and Iceland. Rainbow's entry into this trade pierced what had until then been a monopoly of Icelandic shippers:[1] its vessel "Rainbow

[1] For nearly twenty years, no United States-flag vessel operated between this country and Iceland. *Rainbow Navigation, Inc. v. Department of the Navy*, 783 F.2d 1072, 1074 (D.C.Cir.1986).

Hope," was the only non-Icelandic ship to participate in this trade, as no other American shippers had found it profitable to do so. The Republic of Iceland, a NATO ally of the United States, made urgent representations to the Department of State to bar Rainbow in an attempt to recapture the monopoly its vessels had previously enjoyed.

In response to these pressures, the Secretary of the Navy made a finding in August 1985 that Rainbow's rates were "excessive and otherwise unreasonable"—the only basis upon which that American company could lawfully be deprived of the right established by the Cargo Preference Act of 1904[2] to carry American military cargo. The Secretary's finding of excessive pricing turned out, upon examination, to be fictitious and pretextual. Inquiry revealed, and the Court found, that the Navy's determination adverse to Rainbow was based not on freight rates—which were no higher than those that had previously been charged[3] —but on foreign policy, political, or geopolitical grounds. *Rainbow Navigation, Inc. v. Department of the Navy*, 620 F.Supp. 534, 540 (D.D.C.1985) (*Rainbow I*). The Court of Appeals, in an opinion authored by then Judge Scalia, affirmed. *Rainbow Navigation, Inc. v. Department of the Navy*, 783 F.2d 1072 (D.C. Cir.1986).

Next, the Navy attempted another and different end run around the Cargo Preference Act. Under government regulations, military aircraft may be used under certain narrow circumstances in lieu of private commercial vessels to carry military cargo, and such aircraft now began to take over the Iceland-United States military cargo traffic, squeezing out Rainbow.[4] However, the regulations contain a presumption in favor of commercial carriage, and they stipulate that military aircraft may displace commercial carriers only if the aircraft "are available and not fully utilized." 48 C.F.R. § 47.101(b)(1).

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[2] 10 U.S.C. § 2631.

[3] Indeed, the American military had never prior to the Icelandic government's lobbying effort complained about Rainbow's rates- the only complaint was that of Icelandic shippers which charged that the rates were too low. The 1985 finding of excessive pricing was the first one made in the 81-year history of the Act.

[4] It obviously was the expectation of the officials in all this that once Rainbow was eliminated, the status quo ante would return, and the Icelandic shippers would regain their monopoly, curing one of the State Department's headaches.

Once again, the legally necessary findings were promptly made. The Navy duly concluded, on the basis of sworn statements from officials,[5] that aircraft were not being flown to Iceland for the purpose of picking up military cargo; that, on the contrary, such aircraft were "available and not fully utilized;" and that therefore Rainbow's services could largely be dispensed with. Once again, the Secretary's determination and the sworn statements of his military and civilian subordinates were false.

In fact, the number of military flights from Iceland to this country had sharply increased concurrently with the diversion of this cargo from Rainbow, and the Court found that the aircraft to carry the cargo had not been "available" but had been dispatched to Iceland for the specific purpose of carrying the freight in question. The Court held that the Navy had once again attempted unlawfully to deprive Rainbow its rights under the law. Memorandum Order dated October 17, 1986 (*Rainbow II*).

That is where the matter stood when, on September 24, 1986, the United States and Iceland signed a treaty[6] regarding the military cargo in the United States-Iceland trade.[7] The treaty provides for a competition between the shipping companies of the two nations for that cargo. Following that competition, contract awards are to be made to one Icelandic company and one American company, the lowest bidder to receive for carriage sixty-five percent of the cargo, the next lowest bidder, which must be of the other country, to carry the remainder. A competition was conducted in 1987 according to these terms, without difficulty or complaint.

However, the Navy thereafter announced plans to change the method by which the competition was to be held the following year,

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[5] *See* Declarations of Edward Coyle, Deputy Director, Transportation Operations and Policy, Naval Supply Systems Command, Department of Navy, May 30, 1986 and May 9, 1986, and declaration of Tech. Sgt. Patrick Jurgensmeyer, June 19, 1986.

[6] Treaty Between the United States of America and the Republic of Iceland to Facilitate Their Defense Relationship, September 24, 1986, United States-Iceland T.I.A.S. No. – (May 5,1987).

[7] The treaty included a Memorandum of Understanding (MOU). There is for purposes of this litigation no material difference between the two, and they will hereinafter be collectively referred to as the "treaty."

to Rainbow's detriment.[8] The Court once again enjoined the government's attempt to force Rainbow out of business, upon its conclusion that the method devised by the Navy following the 1987 competition violated the Icelandic treaty. *Rainbow Navigation, Inc. v. Department of the Navy*, 686 F.Supp. 354 (D.D.C.1988) (*Rainbow III*).[9] That is where the matter stood when the most recent set of motions was filed.[10]

II

[1] As indicated above, in 1987, following ratification of the treaty with Iceland, the Navy's Military Sealift Command held a competition that caused no controversy. However, in February 1988, the Sealift Command issued a different Request for Proposals (RFP) regarding the next Iceland cargo contract. Following the Court's decision in *Rainbow III*, the government recognized that this RFP did not conform the treaty as the Court had construed it, and it proposed to the Court yet another RFP which, while conforming to *Rainbow III*,[11] includes a number of new provisions and conditions and eliminates some others.[12]

[8] Among other changes discussed below, the Navy proposed to replace the 1987 model single competition with two separate competitions, one for sixty-five percent of the cargo, the other for thirty-five percent. The reasons why this method of proceeding violates the treaty to the disadvantage of Rainbow are detailed in the *Rainbow III* Opinion, *infra*.

[9] Additionally, as soon as Rainbow sought relief from the government's unlawful actions, the Navy filed an administrative protest against Rainbow with the Small Business Administration, challenging the company's previously settled status as a small business. That patently retaliatory action, too, proved to be unsuccessful, as the SBA rejected the protest. Letter of May 25, 1988, Thomas Dumarosq, Acting Regional Administrator for Procurement Assistance, SBA, attached to "Notice of Withdrawal of Motion to Enjoin the Navy from Pursuing Its Collateral Small Business Protest."

[10] The May 17,1988 order was in the form of a preliminary injunction. The parties are now before the Court on Rainbow's request for permanent relief and on the government's motion to dismiss and for partial summary judgment.

[11] Nevertheless, the government appears to be still contending that the treaty does not require a single competition as the Court had concluded in *Rainbow III*. Defendants' Reply Brief at 5 n. 6.

[12] Citing its apparent acquiescence in *Rainbow III* (*but see* note 11, *supra*), the government has moved for partial summary judgment on the ground of mootness.

Rainbow, supported by the International Organization of Masters, Mates and Pilots (maritime union), intervenor herein,[13] is challenging this new RFP, arguing that, in its eagerness to eliminate Rainbow, the government has once again overstepped the bounds of law, treaty, and prior undertaking. The Court agrees.

In order to understand the current phase of the dispute between the parties, it is necessary to discuss the proceedings in the United States Senate in connection with the ratification of the Icelandic treaty.[14]

[2] The first question to be considered in that connection is a legal one – what is the effect of representations made by the Executive Branch to the Senate? Although when this litigation was before the Court last Spring the government took the position that the representations made in connection with the treaty ratification proceedings were merely "precatory" and "non-binding," *Rainbow III, supra*, 686 F.Supp. at 357 n. 17, this apparently is no longer the government's view. The Court rejected that position,[15] and the government now appears to disavow it,[16] stating that

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The motion lacks merit, not only because the basic controversy between the parties regarding Navy compliance with the treaty is very much alive, but also because, in view of the past history of this case, the Court affirmatively concludes that, absent an injunction, the Navy is likely to repeat its unlawful conduct. *See Roe v. Wade*, 410 U.S. 113,125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147 (1973); *British Caledonian Airways, Ltd. v. Bond*, 665 F.2d 1153, 1157-58 (D.C.Cir.1981).

[13] The crew of the "Rainbow Hope" is composed entirely of American seamen.

[14] The text of the treaty itself insofar as it bears on this lawsuit is fully discussed in *Rainbow III*.

[15] The same position has also been rejected by eminent authorities in other contexts. *See* The ABM Treaty Interpretation Resolution, Report of the Committee on Foreign Relations, United States Senate, S.Rep. No. 164 (100th Cong., 1st Sess. 49 (citing testimony of Prof. Henkin) (1987). *See also*, Restatement (Second) Foreign Relations Law of the United States (Revised), Tentative Draft No. 6 (1985), § 314 (comment d and § 314(2); and *see also*, 134 Cong.Rec. S6774-75 (daily ed. May 26, 1988) (statement of Sen. Nunn) (government's position in *Rainbow* that treaty testimony is nonbinding "undermined not only the Senate as an institution but the whole treaty ratification process as set forth in the U.S. Constitution").

[16] However, on this issue as on the issue of the requirement of a single competition (*see* notes 11 and 12, *supra*), the government's position is still either shifting or equivocal. Thus, the government has observed that Executive statements should be

> . . . authoritative Executive branch representations concerning the meaning of a Treaty which form part of the basis upon which the Senate gives advice and consent are entitled to be accorded binding weight as a matter of domestic constitutional law, and the Executive branch fully accepts that it is bound by such statements . . . .

Defendants' Reply Brief and Opposition to Plaintiff's Cross-Motion for Summary Judgment at 2 n. 2.

This Court has no doubt about the obligation of the Executive Branch to stand behind the representations made by its officials to the Senate committee having jurisdiction, and to comply with the conditions attached, formally or informally, by the Senate as part of its ratification.[17] Any other rule would undermine the authority of the Senate under Article 2 section 2 of the Constitution to concur or to fail to concur in treaties made by the Chief Executive. If, following ratification, the Executive could unilaterally change the meaning of a treaty as it had been presented to the Senate, the careful consideration the Senate gives to treaty language, purposes, and effect, would stand in constant peril of nullification by reinterpretation by Executive officials, high or low.[18]

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given binding weight only when they were "authoritatively and explicitly communicated to the Senate by the Executive and were part of the basis on which the Senate granted its consent...." Further, referring to Mr. Derwinski's "save harmless" statement (*see* p. 343, *infra*), the government asserts that his statement "imposes *no* binding obligations on the government" (emphasis added). Defendants' Reply Brief to Intervenor Eimskip's Response at 2 n. 1. These assertions appear to be crafted to construct yet another avenue of retreat from commitments made to the Senate.

As indicated below, Counselor Derwinski and Admiral Piotti represented the Executive Branch before the Senate Committee on Foreign Relations. It would be seriously misleading to the Senate and disruptive of the constitutional ratification process if it were to be accepted that some representations made to that legislative body by witnesses such as these were deemed authoritative but not others, depending upon a subsequent decision of members of the Executive Branch.

[17] As indicated below, the Senate Committee on Foreign Relations recommended advice and consent to the Icelandic treaty only on the basis of the Executive assurances made regarding Rainbow.

[18] The Senate Committee on Foreign Relations has stated in connection with the debate over the ABM treaty, the Executive's unilateral reinterpretation of treaties "assaults the Constitution's allocation of the treaty power," "disparages the Constitution's requirement that the President take care that the laws be faithfully

It is appropriate, then, to consider exactly what representations were made by the Executive Branch witnesses regarding the meaning and effect of the Iceland treaty, and what conditions or understandings were arrived at as part of the ratification process.

The principal Executive Branch witnesses who testified before the Senate Committee on Foreign Relations on the Icelandic treaty were the Hon. Edward J. Derwinski, Counselor of the Department of State, and Rear Admiral Walter T. Piotti, Jr., Commander of the Navy's Military Sealift Command.[19] Senator Mathias asked the witnesses about the "current American flag carrier," *i.e.*, Rainbow,[20] and whether any plans were in effect to "save harmless the current cargo carrier." Mr. Derwinski replied to this query with two assurances: (1) that carrier has been involved in a number of discussions with appropriate authorities, and (2) although the Department obviously could not provide in the treaty for specific protection for an entity, "we did have in mind at all time the need to *protect the interests of the current carrier*" (emphasis added).[21]

While this language suggests that Rainbow had been a party to discussions regarding the appropriate way of implementing the treaty (and by inference that there was agreement with the plans made with respect thereto), and that the Department was mindful of the need "to protect the interests" of Rainbow and to "save [it] harmless," these assurances were apparently not deemed to be sufficiently airtight by Rainbow and those who were supporting its cause.[22]

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executed" and "denigrates the central precept of international order – the principle that treaty obligations are to be carried out in good faith." Senate Committee on Foreign Relations, The ABM Treaty Interpretation Resolution, S.Rep. No. 164, 100th Cong., 1st Sess. 47 (1987).

[19] Admiral Piotti had the responsibility for implementing the treaty on behalf of the Navy.

[20] Rainbow was, is, and for several years has been the only American flag carrier operating in the Icelandic trade.

[21] United States-Icelandic Treaty on the Carriage of Military Cargo: Hearings Before the Committee on Foreign Relations, 99th Cong., 2d Sess. (1986) at 11.

[22] The maritime unions, in particular, lobbied to retain in being this particular source of jobs for American seamen. *See* Letter from Maritime Unions to Sen. Richard G. Lugar, Chairman of the Committee on Foreign Relations (Sept. 30, 1986); *see also*, Opposition of Intervenor International Organization of Masters, Mates and Pilots to Defendant's Motion to Dismiss in Part and for Summary Judgment at 2-3.

Accordingly, language was included in the Senate Report which recommended ratification of the treaty to make more explicit the requirement that Rainbow was to be protected, as follows:

> [T]he committee recommends that the Senate advise and consent only with the assurances of the Departments of State and Defense that ... the treaty will be implemented in such a way that the existing United States-flag service in the Iceland trade would not be disadvantaged as a result of the treaty. The Committee received those assurances at its hearing, and recommends advice and consent on that basis only.
>
> The Committee understands and expects that the economic viability of the United States-flag service will be maintained as if the 1904 Act were fully in effect in the Iceland trade.

S.Rep. No. 27, 99th Cong., 2d Sess. 2 (1986) at 3.[23]

This was not a unilateral Senate declaration; Mr. Derwinski, the principal Administration witness, testified: "*I have seen the language which is proposed for your committee report, yes, sir. And I have absolutely no objections to it.*"[24]

[3] The Court concludes that, insofar as the United States government is concerned, the treaty includes two undertakings: first, that the existing United States-flag service in the Iceland trade would not be disadvantaged as a result of the treaty; and second, that the economic viability of that service will be maintained just as if the 1904 Act were fully in effect. The issue before the Court is whether the method chosen by the Navy in the proposed RFP for implementing the treaty is consistent with these undertakings.

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[23] Senator Pell reiterated during the floor debate that the Executive had "assured the Committee that the Treaty will be implemented in such a way that the existing Icelandic trade would not be disadvantaged." 132 Cong.Rec. S15661 (daily ed. October 8, 1986).

[24] Hearings at 11-12.

III

Plaintiff asserts that the Navy through its Military Sealift Command, which has operational responsibility with respect to the Icelandic trade, has violated these governmental undertakings in several respects. In Part IV, *infra*, the Court examines these complaints and the specific Navy measures to which they relate. Two fundamental points bear noting at the outset, however.

First. The provisions in the RFP that the Sealift Command now deems essential had never been a part of any procurement with respect to the Icelandic trade, and they were not a part thereof even as late as 1987.[25] These provisions acquired critical importance to the Sealift Command only when the Court in *Rainbow III* struck down as inconsistent with the treaty the multiple procurement system that had been adopted in the treaty's wake. It was only then that this Command, scrambling to find yet another means of disadvantaging and possibly eliminating Rainbow, came up with the current provisions.

[4] But the fact is that nothing new had occurred with respect to the Icelandic trade to cause a major reexamination of the RFP provisions – nothing except that the treaty, the Executive undertakings with respect thereto, and the Court's construction of the treaty obligations had given Rainbow a new lease on life. Since the measures discussed below had not previously been regarded as necessary or appropriate, and since the Sealift Command insists on applying them now for the first time in the absence of new operational developments in the Icelandic trade, the conclusion is compelling, and the Court finds, that the new measures are simply means to frustrate once again Rainbow's efforts to survive economically and to carry freight between the United States and Iceland in competition with Icelandic shipping interests. These provisions are not measures genuinely adopted to safeguard governmental interests; the claim that this is their purpose is mere pretext.

The government, no doubt inadvertently, acknowledges this truth when it states that "[f]ollowing the issuance of the preliminary

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[25] The 1987 procurement, being the one closest in time to the adoption of the treaty, may be regarded as constituting the Navy Department's appropriate interpretation of the treaty. *Cf. Lowe v. Securities and Exchange Commission*, 472 U.S. 181, 216, 105 S.Ct. 2557, 2576, 86 L.Ed. 2d 130 (1985) (White, J., concurring).

injunction, [the Military Sealift Command] again reviewed its requirements for restrictive specifications dealing with the carriage of goods to Iceland."[26] Why a review following the issuance of the injunction? What did the injunction have to do with the objective circumstances of the United States-Iceland trade? If the Sealift Command at that juncture saw a need for canvassing possible restrictive specifications, that need could only have been stimulated by the desire to circumvent the injunction and to deprive Rainbow once again of its rights under law. This conclusion is buttressed by the circumstance that every single new specification adopted at that time would have the effect of crippling one aspect or another of Rainbow's operations and hence of undermining its viability.

In short, the current set of measures is as suspect as the false freight rate claim made by the Navy in 1985;[27] its false assertion that military aircraft were "available" to take over the freight-carrying functions from Rainbow in 1986;[28] its sudden, unsuccessful challenge of Rainbow as a small business;[29] and its subsequent distortion of the meaning of the treaty.[30]

Second, all the "specific" issues which divide the parties revolve around one element – is the Navy required to seek the most economical means of transporting military cargo to and from Iceland, or must it depart from that standard as a consequence of the treaty and the undertakings made pursuant thereto? The answer, plainly, is that the treaty vested rights in the "current carrier," *i.e.*, Rainbow, that override the Navy's current emphasis on the most economical means of carriage.

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[26] Defendants' Motion to Dismiss at 7. Admiral Piotti, Commander of the Military Sealift Command, went so far in his persistent efforts to disadvantage Rainbow as to recommend at the same time that the treaty (or rather the MOU) be renegotiated so as to escape the effect of the Court's rulings. However, the Department of State was willing to promise only that it would conduct a review of the MOU's operations. *See* exhibits attached to the brief of the maritime unions. Opposition, Annex A.

[27] *See* pp. 340-341, *supra*.

[28] *See* p. 341 *supra*.

[29] *See* p. 342, note 9, *supra*.

[30] *See* p. 342, *supra*. While these various measures were taken in the name of the Department of the Navy, their author appears to have been Admiral Piotti, Commander of the Military Sealift Command.

A moment's reflection will confirm that this is so. If the usual award procedure had been contemplated, the special protections accorded to the "current carrier" would have been superfluous; Rainbow always had the right to bid like every other company and to be awarded the contract if its bid was lower than those of all the others. Plainly, the representations made to the Senate were intended to have the effect of granting to Rainbow, the current carrier, an advantage over what would have been the award process in the absence of such representations.

Although the government suggests otherwise, departure from the most economical purchasing policy hardly constitutes a novel concept, either in general or with respect to the Cargo Preference Act.

The statutes, the regulations, and the treaties entered into by the United States are replete with instances where, for one public policy reason or another, a departure occurs from the standard for which the government argues here – that the government is entitled to reject those contracts that are not the most economical available. Minority set-asides, small business provisions, special privileges allowed veterans, purchases of agricultural commodities above market price – these are just a few of the programs in that category. And to the same effect is of course the Cargo Preference Act itself which requires shipping on United States-flag vessels for certain cargo in order to foster and protect the American merchant marine, *American Maritime Association v. United States*, 766 F.2d 545, 548 (D.C.Cir.1985), even though such shipping may be more costly to the United States government than shipping in Panamanian, Liberian, or other foreign-flag bottoms.

As the Court of Appeals said in *American Maritime Association, supra*, "Congress enacted these statutes to create a strong domestic merchant marine capable of competing with foreign carriers in the world market, and each act recognizes that foreign subsidies and high domestic labor costs place American-built and American-operated ships at a competitive disadvantage with foreign vessels in the absence of government assistance." 766 F.2d at 548.[31] One means of ac-

[31] By helping to maintain a domestic merchant marine fleet, the cargo preference laws are *inter alia* a vital component of our national defense. *See, e.g.*, S.Rep. No. 27, 99th Cong., 2d Sess. 3 (1986).

complishing these objectives was to provide "indirect subsidies" to United States-flag vessels by "reserving certain cargoes, called preference cargoes, for those ships and by allowing domestic bulk operators to bid for preference cargos at rates well above world rates." *Id.*

IV

[5] The question that must be considered next is what was meant when it was decided between the Executive Branch and the Senate that Rainbow was not to be disadvantaged as a result of the treaty. The government argues that Rainbow is not being disadvantaged; that the Navy always had the power under the 1904 Act, even absent the treaty, to write new and special conditions into the contract awards, and that it is just now for the first time availing itself of that power. That contention posits a disingenuous way of escaping a solemn commitment, and one that is unfortunately consistent with the government's course of conduct from the very beginning of this controversy – too clever by half.

The Senate plainly did not have the purpose to secure from the Navy the meaningless assurance that, although the pre-treaty conditions would apply, the Department nevertheless could, in the exercise of its pre-existing inchoate power, restructure the competition in such a way as to cripple Rainbow in the Iceland military cargo trade. The government was bound as a result of the ratification process not to "disadvantage [Rainbow] on account of the treaty." What the ratification hearings and reports demonstrate is that, when the Senate Foreign Relations Committee issued Report No. 27, and when Mr. Derwinski expressed his concurrence on behalf of the Executive, it was intended that, except for the 65-35 division of the trade between an American and an Icelandic shipper, the status quo ante would be reestablished, and that, notwithstanding that one change, Rainbow was to have the same status in the Icelandic trade that it had prior to the treaty approval.

That construction is buttressed by the "economic viability" phrase used in the Senate Report. There was, as indicated above, a specific undertaking to maintain Rainbow's viability – an undertaking that has meaning and must be respected. Rainbow's guaranteed ability economically to survive may no more be destroyed by the back door

of the imposition of conditions never heretofore required in the Icelandic military cargo trade than by the more direct means of paying Rainbow less than the normal renumeration for cargo transportation. The maintenance of the "current carrier's" economic viability was a central condition in the ratification of the Icelandic treaty; it plainly is violated by a change in the customary economic environment of the Icelandic trade in the wake of the treaty so as to undermine that carrier's ability to exist.

This does not mean, as the government would have it, that Rainbow claims or must be given a "property right" in the Iceland military cargo trade or that the Navy is forbidden ever to vary the terms of the contracts. What it does mean, however, is that the Navy, having proceeded for years on the basis of a certain pattern of awarding Icelandic cargo contracts pursuant to the 1904 Act, could not, as soon as the treaty took effect, drastically change that pattern in a number of ways, each of which has the effect, and most probably the purpose,[32] of making it impossible for Rainbow to participate in that trade on a basis that leaves it economically viable. What it also means is that Rainbow may not be subjected to requirements that are different and that leave it worse off than it was under the Cargo Preference Act prior to the signing of the treaty.[33] But that, as will now be seen, is precisely what the Military Sealift Command did in the proposed 1988 procurement.

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[32] *See* Part I, *supra.*

[33] The government continues to distort the record when it maintains that the treaty protects only "a U.S. flag carrier, not necessarily the incumbent." Motion to Dismiss at 17. Similarly, the government purports to instruct this Court to review the procurement for the rights of "all U.S.-flag carriers interested in the carriage of military cargo between the United States and Iceland." Defendants' Reply Brief at 3.

As must by now be abundantly clear, the protections of the treaty were meant to protect the "current carrier." Moreover, since there had been no other American carrier in the Icelandic trade for many years, and the entry of none was at all likely if only because of the Navy's hostility to non-Icelandic carriage of the cargo, the government's solicitude for some other, non-existent carrier is, to put it gently, disingenuous. The government compounds the misleading character of its submissions when it states that for twenty years all military cargo was carried on ships other than Rainbow's, Defendants' Reply Brief at 12 n. 11, without revealing that these were all Icelandic ships, not American-flag carriers.

Among the provisions included in that procurement – provisions that had never been a part of any prior procurement with respect to that trade and that were not a part of it in 1987[34] – are the following.

The original 1988 RFP would have permitted carriage by the owners of small vessels ("supply boats") that, unlike Rainbow, lack the capability to carry sixty-five percent of the trade, and thus to require Rainbow to compete under entirely new and different conditions. The Sealift Command, recognizing the patent impropriety of this scheme, subsequently modified it somewhat in the proposed new RFP. That RFP would have bids of other carriers approved if they are theoretically able to carry sixty-five percent of the cargo (without regard to the number of vessels employed); however, the carriers are not required actually to commit space sufficient to carry sixty-five percent of the Iceland trade.[35]

To allow Rainbow's putative competitors to bid on sixty-five percent of the trade although committing vessels with only a thirty-five percent capacity would not only be changing the character of the competition as it existed under the Cargo Preference Act,[36] in violation of the representations made at the time of the ratification of the treaty, but it would also effectively eliminate Rainbow. As the Sealift Command undoubtedly knew, Rainbow could not conceivably compete on this basis because its vessel, the "Rainbow Hope," would have fixed costs relating to at least sixty-five percent of the Icelandic trade when others, by committing only one-half the space to that trade, could reduce their costs by half, allowing them to operate at a profit on a thirty-five percent basis. Once Rainbow was eliminated, the small supply boat operators could be expected to depart, and the Icelandic shipping companies would again have the monopoly – apparently the purpose of this and the other recent manipulations of the RFP provisions.

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[34] Except for the time charter element that was favorable to Rainbow and that was eliminated for 1988. *See* pp. 348-349, *infra*.

[35] The space apparently needs to be adequate only for thirty-five percent of the trade.

[36] No small-vessel American-flag carriers had ever competed in the Icelandic trade.

Next both the "Rainbow Hope" and the Icelandic vessels have regularly carried cargo that was not and could not be containerized, and that was therefore in underdeck stowage. Here again, the Sealift Command has largely eliminated the requirement for protected underdeck stowage of uncontainerized cargo, although such a requirement had always theretofore been regarded as necessary. Here again, the post-1987 change represents a transparent effort to make it possible for small supply boats to take over part of the cargo, at least until Rainbow has been driven from the Icelandic trade. And here again, this change does not maintain the competition as if the Cargo Preference Act had been in effect in the Icelandic trade, as the Navy has the legal obligation to do in view of the treaty ratification undertakings.

Further, following the appearance of Mr. Derwinski and Admiral Piotti before the Senate Committee at which the issue of the viability of Rainbow was discussed, the Sealift Command expressed its intention to use a time charter to achieve the viability objective. The time charter issue arose because Rainbow was being reduced from the possibility of carriage of one hundred percent of the Icelandic trade to only thirty-five percent of that trade.

It was obvious to the Navy then, and it is obvious to the Court now, that a ship that operated at full capacity when it was entitled to carry all of the trade will be economically disadvantaged if it is restricted to the carriage of only thirty-five percent of that trade, unless the government takes steps to vitiate the disadvantage caused by such a reduction. The means initially selected to ensure Rainbow's economic viability in these circumstances was the leasing of the "Rainbow Hope" full time, and its use outside the Icelandic trade on an as-needed basis. Indeed, Admiral Piotti himself – who has proved himself to be an implacable foe of Rainbow and American shipping in the Icelandic trade – testified when the time charter issue was put to him, that "[i]n the carriage of thirty-five percent of the cargo, it was up to us to insure that the carrier would recover its fully distributed cost plus make a reasonable profit," and when asked whether the method employed was a time charter, he answered in the affirmative.[37]

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[37] Piotti deposition at 44-45; *see also*, pp. 36-37.

Since that time, the Sealift Command has rejected the time charter concept, and Rainbow would thus be limited to a thirty-five percent use of its large "Rainbow Hope" vessel – a certain prescription for economic collapse.[38] The time charter is an integral part of the Executive's commitment to the Senate in terms of Rainbow's economic viability, and it may not now be jettisoned.[39]

Finally, the Sealift Command has decided that a self-sustaining vessel, *i.e.*, one with its own cranes, such as is represented by the "Rainbow Hope," is no longer needed on this route. The Command notes that mobile cranes are available in Iceland, and that these cranes can be sent to the port of Njardvik. Even Eimskip, the Iceland Steamship Co., refutes this Navy contention, stating, "[i]n particular, the lack of adequate crane facilities at Njardvik sometimes causes carriers to take extraordinary, time-consuming and expensive measures to offload their vessels. A mobile crane may be required which must be ordered from out of town if not available in Njardvik. The unloading process is much slower in such circumstances so that vessel time in port is increased beyond what may be feasible to conduct a viable commercial operation." Response of Iceland Steamship Co., Ltd. to Defendants' Motion to Dismiss in Part or for Summary Judgment at 14-15.

While the Court has not undertaken to discuss herein every single change from previous practice the Navy has effected, enough has been said to support the conclusion that the government has violated the undertakings it gave to the Senate, in that Rainbow has been severely disadvantaged with respect to the Icelandic trade and its economic viability.[40]

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[38] The MOU itself provides that the contract award shall be such that it "adequately covers the carrier's costs, assuming normal efficiencies of operation, plus a reasonable profit." Maritime Union Opposition at 8.

[39] It may be that the government could devise other means to ensure Rainbow's economic viability; however, at this time the only means seriously proposed either by the Navy or by Rainbow is the time charter.

[40] Eimskip, the Iceland Steamship Co., Ltd., an intervenor herein, in addition to commenting on the principal issues more or less along the lines of the government's submissions, argues that the Court should protect it from competition by American carriers with respect to commercial cargo. The Senate's ratification processes, which are at issue here, were designed to protect United States-flag carriers, not Icelandic vessels.

V

This case presents a sorry saga of duplicity. What is particularly mystifying about its history is why the government, acting through the Departments of the Navy and Justice, persists with iron determination to put out of business a small American maritime carrier in order to please foreign shipping interests, and why this is being done at a time when America's merchant marine has been decimated and most of its merchant seamen have lost their jobs to those working on foreign flag vessels.

As the above recitation of events demonstrates, this governmental effort has proceeded systematically now for over three years, buttressed by false sworn statements, and notwithstanding law, regulation, treaty obligation, and solemn undertaking. As a consequence of this effort, a small American corporation has had to fight for its life and the livelihood of its sailors, no doubt at great and potentially crippling expense, again and again and yet twice again. The arrogance of power has seldom been displayed in more telling fashion.

Much has been said and written in recent years, some of it well justified, about the intrusion of the Judiciary into areas of policy-making that are properly reserved to the political branches of government. But the courts legitimately can and must perform the function of calling a halt when governmental officials, in the name of Executive prerogative, oppress citizens in violation of law, regulation, and plain fair dealing. Certainly the courts have an obligation to provide the protective umbrella of the law when, as here, either for foreign policy advantage or simply out of pique at resistance by means of litigation, the Executive denies to a small American company the rights granted to it, as to all citizens, under law.

Oliver Wendell Holmes, one of our most distinguished jurists, said sixty years ago certain governmental action injurious to citizens would not be countenanced "while this Court sits."[41] That principle, which has been invoked several times since then in other cases involving the protection of citizens' rights,[42] is still alive, and not merely at the level of the Supreme Court.

[41] *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223, 48 S.Ct. 451, 453, 72 L.Ed. 857 (1928) (Holmes, J., dissenting).

[42] *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 795, 103 S.Ct. 3330, 3338, 77 L.Ed.2d 1019 (Burger, C.J.).

A permanent injunction prohibiting implementation of the latest set of measures adopted by the Navy is being issued contemporaneously herewith.[43]

ORDER

Upon consideration of plaintiffs' motion for summary judgment, defendants' motion for partial summary judgment and to dismiss, and the submissions of all the parties, including those of the International Organization of Masters, Mates and Pilots, and of the Iceland Steamship Co., Ltd., and the entire record herein, it appearing that there are no material facts genuinely in dispute, and that plaintiffs are entitled to final judgment as a matter of law, it is this 15th day of November, 1988

ORDERED that the motion of plaintiff Rainbow Navigation, Inc. for summary judgment be and it is hereby granted, and that defendants' motion be and it is hereby denied; and it is further

ORDERED that the 1988 RFP, No. 0003388R8600 for the Iceland military cargo trade challenged in this case, fails to meet the applicable requirements of law, treaty, and regulation, and that the proposed RFP, which defendants offered *sua sponte* to this Court in connection with their motion for partial summary judgment, also fails to meet these requirements.

For the reasons set forth in the accompanying Opinion, it is further

ORDERED that any procurement conducted by defendants for the Iceland trade shall be in compliance with the following criteria:

1. Consistent with the treaty between the United States and Iceland, sixty-five percent of the trade shall be awarded to the low bidder, and the remainder shall be awarded to the next lowest bidder of the other country, on the basis of a single competition under which each bidder shall offer, and shall be required to provide service capable of carrying at least sixty-five percent of the trade;

[43] In terms, that injunction protects only Rainbow, the current carrier, which is the only shipper-plaintiff herein. The Court is not called upon to decide in this lawsuit, and it does not decide, whether and to what extent other American-flag carriers may also be entitled to enjoy the protection provided by the commitments made by the Executive in connection with ratification of the treaty.

2. Except as provided in paragraph 1 hereof, any competition for the military cargo trade between the United States and Iceland shall operate with respect to American flag vessels as if the Cargo Preference Act of 1904 were still fully in effect; the current American-flag shipper Rainbow Navigation, Inc., shall not be disadvantaged on account of the treaty; and the requirements imposed upon its American-flag vessels shall be the same as if Cargo Preference Act of 1904 were still fully in effect; and

3. The economic viability of the current American-flag carrier may not be adversely affected by the implementation of the treaty (including the fact that its vessel or vessels may carry only thirty-five percent of the trade, that is, less than they would have carried under the Cargo Preference Act of 1904) and defendants shall affirmatively structure the competition to include a time charter arrangement or some other means equally effective to ensure that the continued economic viability of such carrier is maintained as if the Cargo Preference Act of 1904 were fully in effect; and

4. Except as otherwise ordered by the Court, any competition for the United States-Iceland cargo trade shall be conducted as a small business set-aside, in accordance with all applicable statutory and regulatory requirements.

686 F.SUPP 354 (D.D.C. 1988)

RAINBOW NAVIGATION, INC., Plaintiff,

v.

DEPARTMENT OF the NAVY, et al., Defendants.

Civ. A. No. 88-0992.

United States District Court,
District of Columbia.
May 17, 1988.

Maritime shipper and its union sought preliminary injunction to prevent Department of Navy from holding two separate bid competitions for maritime military shipping between United States and the Republic of Iceland. The District Court, Harold H. Greene, J., held that: (1) union and shipper had standing; (2) treaty was self-executing; and (3) shipper and union were entitled to preliminary injunction.

So ordered.

1. Treaties 13

American maritime shipper, previous low bidder under government contract for shipping to Iceland, and union of its merchant seamen had standing to sue to prevent Department of Navy from holding two separate bidding procedures for portions of shipping business to Iceland in violation of language in memorandum of understanding between the United States and the Republic of Iceland; Navy's actions threatened shipper's zone of interest.

2. Treaties 13

Absence of an express grant of private right of action under a treaty is not determinative of whether one exists; when treaty is not explicit on question of whether it is of its own force a part of United States law, court must interpret it to effect the intent of the signatories.

3. Treaties 12

Treaty and accompanying memorandum of understanding between the United States and Republic of Iceland were self-executing; lack of any contrary evidence in treaty and memorandum language, and representations of the executive branch to the United States Senate during ratification hearings demonstrated the self-executory nature of the treaty.

4. United States 125(18)

Review provisions of Administrative Procedure Act waive sovereign immunity for injunction actions. 5 U.S.C.A. § 502.

5. Injunction 138.63

American maritime shipper and union of its employees were entitled to preliminary injunction, prohibiting Department of Navy from holding two bid competitions for military shipping business to Republic of Iceland, one for 65% and the other for 35% of the business; harm which would result to American shipper, language of treaty between the United States and the Republic of Iceland, and extreme likelihood of success on part of shipper supported the injunction.

* * * *

Jeffrey Hunter Moon, Asst. U.S. Atty., Washington, D.C., for defendants; Richard Haynes, Daniel W. Wentzell, E. Duncan Hamner, Chaina Swedarsky, Alan W. Mendelsohn, Samuel Novello, Office of General Counsel, U.S. Dept. of the Navy, Washington, D.C., of counsel.

Karen Hastie Williams, Clifton S. Elgarten, Stuart H. Newberger, Crowell & Moring, Washington, D.C., for plaintiff.

Benjamin L. Zelenko, Martin Shulman, Landis, Cohen, Rauh & Zelenko, Washington, D.C., for intervenor Intern. Organization of Masters, Mates and Pilots.

OPINION

HAROLD H. GREENE, District Judge.

I

This is the third time that these parties have been before the Court with respect to similar controversies.[1]

In October 1985, at the request of Rainbow Navigation, Inc. (Rainbow), the Court issued an injunction against the Department of the Navy, restraining Navy plans to deprive Rainbow of the preference granted to it by the Cargo Preference Act of 1904, 10 U.S.C. § 2631. It appeared that the Secretary of the Navy had determined that Rainbow's rates were "excessive and otherwise unreasonable" – if true, a valid reason for denying it the otherwise available preference. But after briefing and hearing, the Court found that the Secretary's findings "were nothing more than an after-the-fact attempt to shore up a decision made on other grounds." *Rainbow Navigation, Inc. v. Department of the Navy*, 620 F.Supp. 534, 540 (D.D.C.1985). More specifically, the Court concluded that the Navy's determination was not based on Rainbow's freight rates but on "foreign policy, political, or geopolitical grounds." *Id.* at 541.

What had happened was that the Department of State, desirous of good relations with Iceland, an ally of the United States, gave in to entreaties from that nation for the recapture of the U.S. military cargo trade exclusively for Icelandic shipping interests.[2] The determinations, declarations, and representations made to the Court regarding Rainbow's allegedly excessive rates, it had turned out, not only were not borne out by the facts but were merely a pretext obscuring the real foreign policy purposes of our government.

Since Rainbow was not in violation of the Cargo Preference Act, and was entitled under law to the benefits of the Act, the Court issued an injunction which required the restoration of that company's preference with respect to the carriage of U.S. military supplies between this country and Iceland in accordance with the Act. The Court of Appeals, in an opinion by then Judge Scalia, affirmed this Court's decision.

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[1] The parties are the Department of the Navy and some of its officials, Rainbow Navigation, Inc., the International Organization of Masters, Mates & Pilots (the Union), and Iceland Steamship Co., Ltd. (Eimskip). Eimskip is before the Court for the first time in the current phase of the litigation.

[2] Rainbow may be the only effective competitor of the Icelandic shippers.

Rainbow Navigation, Inc. v. Department of the Navy, 783 F.2d 1072 (D.C. Cir.1986).

While the issues regarding this Navy attempt to bypass the law were still in the courts, the Department engaged in yet a second subterfuge designed to elbow Rainbow out of the Icelandic trade. This time the Navy sought to dispense with Rainbow's services by a diversion of the cargo at issue to military aircraft. Government regulations provided that "the preferred method of transporting supplies for the Government is by commercial carriers," and that government aircraft may be used only "if . . . they are available and not fully utilized...." 48 C.F.R. 47.101(b)(1). Once again, solemn declarations were submitted to the Court to the effect that all missions that carried cargo from Iceland to this country were scheduled there "for purposes other than the carriage of cargo back to the United States" and that "missions were not flown to [Iceland] for the purpose of picking up [such] cargo." This, too, was untrue.

The evidence showed that, after the then lawsuit was filed, a sharp increase occurred in the number of flights from Iceland to this country, and a corresponding decrease in the amount of cargo carried by Rainbow. The Court ultimately concluded that the Navy had once again taken steps unlawfully to squeeze Rainbow out of the Icelandic trade. Memorandum Order dated October 17, 1986.[3] This brings us to the current phase of the litigation.

II

On September 24, 1986, the United States and Iceland signed a treaty, including a memorandum of understanding (MOU),[4] regarding the same military cargo route between the two countries that had been at issue previously.[5] That treaty provides for a competition between

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[3] Partial Summary Judgment was granted to Rainbow as it had requested.

[4] Treaty between the United States of America and the Republic of Iceland to Facilitate their Defense Relationship, with related Memorandum of Understanding, September 4,1986. The United States Senate ratified the treaty and memorandum of understanding on October 8, 1986.

[5] Before the treaty was signed and ratified, the Navy proposed a regulation that, as the Senate recounted in its report on the treaty, "purported to interpret the 'excessive or otherwise unreasonable' provision in the 1904 [A]ct, but that would have, in effect,

United States flag carriers and Icelandic shipping companies for the transport of military cargo between the two countries. The method by which the competition is to be carried out is described in the memorandum of understanding as follows:

> Each competition shall result in contract awards to both an Icelandic shipping company and a United States flag carriers such that not to exceed 65 percent of the cargo shall be carried by the lowest bidder and the remainder shall be carried by the next lowest bidder of the other country....

Pursuant to the treaty and the MOU, a single competition was held in 1987 for the carriage of one year's worth of military cargo on the United States-Iceland route. Eimskip, an Icelandic concern, was the "lowest bidder," receiving 65%, and Rainbow took the remaining 35% as the "next lowest bidder." However, this year the Navy planned to change the process. Acting through the Military Sealift Command,[6] the Navy has announced that it intends to hold two separate competitions, separately priced – one competition for the 65% of the cargo, the other, a separate competition, for the remaining 35% of the cargo.[7] Had Rainbow[8] not filed this action to stop the procurement as violative of the treaty, the MOU, and the Administrative Procedure Act, the Navy would have awarded contracts for the two portions of the cargo

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given the Secretary of the Navy the discretion to waive the [A]ct at any time." S.Rep. No. 27, 99th Cong., 1st Sess. 3 (1986). This appears to have been yet another attempt to oust Rainbow from the Icelandic trade route.

[6] The Military Sealift Command is the United States contracting agency responsible for procurements for the United States-Iceland military cargo sea route.

[7] The Request for Proposals for these competitions was issued on March 25, 1988. In addition to holding two competitions instead of one, other changes in the RFP included that all the cargo would be charged on a straight freight basis (rather than permitting the carrier of the 35% to use a time charter), that vessel specifications would no longer be required, that the Icelandic port of destination would be Rekjavik, much farther from the U.S. military base than Njardvik, that there would be no established schedule for travel, and that there would be no small business set aside. Rainbow complains about these changes as well, but the Court need only rest its preliminary injunction on the Navy's violation of the treaty and MOU.

[8] While the Court herein generally refers for the sake of convenience only to Rainbow on the plaintiffs' side of this litigation, the Union has intervened; it is proceeding on the basis of the same arguments as those made by Rainbow; and it is entitled to the same benefits flowing from the Court's orders. *See* note 1, *supra*.

carriage on April 25, 1988.[9] However, since April 15, 1988, the Navy has been under a temporary restraining order enjoining it from proceeding with the 1988 procurement in the manner planned.

III

[1] Before the Court can reach the substance of Rainbow's complaint, it must address the Navy's threshold defenses – that Rainbow lacks standing to sue, that the Court has no jurisdiction, and that sovereign immunity bars the action. None of these defenses has merit; only the standing issue deserves extended discussion.

[2] The Navy suggests that Rainbow lacks standing because neither the treaty nor the MOU expressly grants a private right of action.[10] However, the absence of an express grant is not determinative. When a treaty is not explicit on the question whether it is of its own force a part of United States domestic law, a court must interpret it to effectuate the intent of the signatory parties.[11]

[3] As the Court of Appeals for this Circuit concluded in *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C.Cir.1976); and *Cardenas v. Smith*, 733 F.2d 909, 918 (D.C. Cir.1984),[12] the language of a treaty may manifest an intent by the signatories that it be or not be self-executing, and if the language is uncertain, resort may be had to the circumstances surrounding the treaty's execution to ascertain that intent. *Id.*[13] A court interprets a treaty as self-executing unless "the

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[9] None of the changes from the 1987 requirements (*see* note 7, *supra*) may become effective if their purpose or effect would be to interfere, directly or indirectly, with the preliminary injunction or the Rainbow and Union rights recognized herein.

[10] In the Administrative Procedure Act, Congress conferred the right of judicial review upon any person "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. Potential and actual government contractors have standing to proceed in district court to challenge a procurement under the Administrative Procedure Act. *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 861-873 (D.C.Cir.1970).

[11] Restatement (Second) of Foreign Relations § 154 (1965).

[12] *See also People of Saipan v. Department of Interior*, 502 F.2d 90, 97 (9th Cir.1974).

[13] Reference by courts to contextual factors surrounding a treaty in order to determine whether it is self-executing occurred even in the politically charged atmosphere of Iranian seizures of property and a suit against a foreign government.

agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, or in those rare cases where implementing legislation is constitutionally required."[14] Applying these standards, the Court has no difficulty concluding that the United States-Icelandic treaty does not require implementing legislation.[15]

In the first place, the government has offered no evidence to rebut the presumption (*see* text to note 14, *supra*) that the Iceland treaty was intended to be effective as domestic law. That alone should end the matter. But there is also ample positive evidence of the self-executing nature of the treaty.

The language of the treaty itself suggests that it was intended to operate of its own force upon ratification. Article I declares that cargo transportation services "shall be provided" on the basis of a competition between United States and Iceland shipping companies which will "ensure" the continued well-being of shippers from each country. Since the subject of the treaty is U.S. military cargo, it is implicit that the United States contracting authority would carry out the competition. This understanding is borne out by the terms of the MOU which explicitly refer to the United States contracting authority.[16]

Similarly, the treaty goes on to state in Article IV that the "provisions of this Treaty and any implementing arrangements concluded pursuant to Article I shall apply notwithstanding any prior inconsistent law or regulation of the United States of America...." Thus, the treaty mandates in terms that, for domestic law purposes, it displaces existing American law.

See American International Group v. Islamic Republic of Iran, 493 F.Supp. 522 (D.D.C. 1980).

[14] Restatement (Second) Foreign Relations (Revised) Tentative Draft No. I (1980) § 131.

[15] Were the treaty not to be read as self-executing, it would not become part of United States domestic law. As a result, Rainbow presumably could sue for relief under the Cargo Preference Act. However, that was not the intent of the two governments when they signed the treaty.

[16] As Article I is written, the United States may not qualify or modify the obligations placed upon it by the treaty through legislation or administrative regulation. *See British Caledonian Airways Ltd. v. Bond*, 665 F.2d 1153, 1161 (D.C.Cir.1981).

Perhaps even more significant than the treaty language are the representations made by Executive Branch officials to the United States Senate in connection with the ratification proceedings. These statements, discussed below, clearly support the interpretation that rights would vest without further legislation, for the officials represented to the Senate that if ratified, the treaty would protect the existing U.S.-flag presence on the United States-Iceland route.[17]

Thus, at the hearings on ratification of the treaty, the Honorable Edward J. Derwinski, Counselor of the Department of State, with Rear Admiral Walter T. Piotti, Jr., Commander of the Military Sealift Command, at his side, assured the Senate that he agreed with the statement by American maritime organizations of which the following paragraph is a part:

> The Administration must further assure that the Treaty, if ratified, will be implemented in such a fashion that the existing United States-flag service in the Iceland trade will not be disadvantaged. In other words, the United States-flag presence and the maritime employment will be maintained just as if the 1904 Act were fully in effect in the Iceland trade.[18]

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[17] The Department of Justice disavowed in court the representations made by the Navy and the Department of State to the Senate during treaty ratification proceedings as merely "precatory" and "non-binding." Hearing on Rainbow's motion for a temporary restraining order, April 15,1988. This position is disturbing since it undercuts the foundation upon which Senate ratification was based, at least in part. As Professor Henkin recently testified:

> The President can only make a treaty that means what the Senate understood the treaty to mean when the Senate gave its consent ... The Senate's understanding of the treaty to which it consent is binding on the President. He can make the treaty only as so understood. He cannot make the treaty and insist that it means something else ... the Constitution clearly implies[ ] that it is what the Senate understands the treaty to mean – that is what the treaty means for purposes of its consent.

The ABM Treaty Interpretation Resolution, Report of the Committee on Foreign Relations United States Senate, S.Rep. No. 164, 100th Cong., 1st Sess. 49 (1987). *See also* Restatement (Second) Foreign Relations Law of the United States (Revised), Tentative Draft No. 6 (1985) § 314, comment d and § 314(2).

[18] *United States-Icelandic Treaty on the Carriage of Military Cargo: Hearings on the Treaty Before the Comm. on Foreign Relations*, 99th Cong., 2nd Sess p. 9 (1986).

Similarly, on the question as to how the treaty would affect Rainbow, the only U.S.-flag carrier on that route, Senator Mathias asked and Mr. Derwinski replied:

> SENATOR MATHIAS: What about the current American flag carrier? Are there any plans in effect to save harmless the *current cargo carrier* that is now carrying supplies to the [U.S.] military base in Iceland?
>
> DERWINSKI: My understanding is that the current carrier has been involved in a number of discussions with appropriate authorities, and despite the fact that we could not provide, obviously, within the treaty for specific protection for an entity, we did have in mind at all times the need to *protect the interests of the current carrier* (emphasis added).[19]

Relying in part upon these representations, the Senate Foreign Relations Committee recommended that the Senate ratify the treaty. In fact, the Committee stated in its report to the full Senate that advice and consent were being conditioned upon three assurances given by the Departments of State and Defense, one of them being that

> the treaty will be implemented in such a way that the existing United States-flag service in the Iceland trade would not be disadvantaged as a result of the Treaty. The Committee received these assurances at its hearing and recommends advice and consent on that basis only.[20]

Two days after the Committee Report was issued, and on the day the Treaty was ratified, Senator Pell repeated this condition of ratification on the Senate floor.[21]

This history clearly shows that the Senate was concerned about protecting the interests of the current American carrier;[22] that to give meaning to that concern, it intended the treaty to provide that protec-

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[19] *Id.* at 11.

[20] S.Rep. No. 27, *supra*, note 5.

[21] 132 Cong.Rec. S15661 (daily ed. October 8, 1986).

[22] As this discussion illustrates, Rainbow has standing since it could hardly be more directly within the "zone of interests" protected by the treaty.

tion without further requirements; and that the Executive Branch agreed.

By even raising the standing issue, the Navy is adding to its pattern of false representations discussed in Part I, *supra*. Having assured the Senate that the treaty would not disadvantage the "existing United States flag service . . . [and that] United States presence and the maritime employment will be maintained" as under the Cargo Preference Act, the Navy is now arguing through its counsel that this assurance is meaningless unless new implementing legislation is first enacted. No mention appears to have ever been made to the Senate or its committee regarding implementing legislation or the need therefor, and the Administration has never proposed such legislation.

The Court concludes that the Iceland treaty is self-executory and that Rainbow and the Union have standing to bring this action.

[4] As to the other threshold defenses advanced by the Navy, they either fall away upon the determination that the treaty is self-executing or they are otherwise unfounded. The Navy protests that the Court lacks subject matter jurisdiction over Rainbow's claims, but according to 28 U.S.C. § 1331, "[t]he district courts shall have original jurisdiction of all civil actions arising under ... treaties of the United States." *See also* U.S. Const. Art. VI Cl. 2. And it is of course well established that the review provision of the Administrative Procedure Act, 5 U.S.C. § 502, waives sovereign immunity for injunction actions.[23]

IV

[5] The Court now turns to the merits of Rainbow's complaint and its request for a preliminary injunction.[24] Rainbow alleges that the 1988 Navy procurement for the United States-Iceland route is

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[23] *See Warin v. Director, Department of Treasury*, 672 F.2d 590, 591-92 (6th Cir.1982); *Neal v. Secretary of Navy*, 639 F.2d 1029, 1036-37 (3d Cir.1981); *Jaffee v. U.S.*, 592 F.2d 712, 717-719 (3d Cir.1979); *Beller v. Middendorf*, 632 F.2d 788, 796-97, 799 (9th Cir.1980).

[24] To prevail on a motion for a preliminary injunction, Rainbow must show (1) that it has a substantial likelihood of prevailing on the merits; (2) that it will be irreparably harmed if an injunction is not granted; (3) that the interests of all affected parties are properly balanced by the said relief; and (4) that the public interest is clearly

contrary to the language and the purposes of the memorandum of understanding. The Navy's answer is that two competitions between American and Icelandic shippers are permitted by the treaty and MOU – one competition for 65% of the cargo, and a second competition for 35% of the cargo. In the opinion of the Court, that construction of the treaty and the MOU is untenable.

The language of the MOU[25] is straightforward and unmistakable:[26]

> . . . *Each competition* shall result in contract awards to both an Icelandic shipping company and a United States flag carrier such that not to exceed *65 percent* of the cargo shall be carried *by the lowest bidder* and *the remainder* shall be carried *by the next lowest bidder of the other country* . . . (emphasis added).

Thus, according to the MOU, for any given shipment period, there is to be a single competition dealing with 100% of the cargo. At each such competition, the Navy awards up to 65% of the cargo to the lowest bidder – a shipper from either country – and the remainder,

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served by the issuance of an injunction. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C.Cir.1977); *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C.Cir.1958).

[25] An MOU is an international executive agreement which must be interpreted according to the principles applicable to treaties. *Air Canada v. U.S. Department of Transportation*, 843 F.2d 1483, 1486 (D.C.Cir.1988). The general rule in interpreting treaties is:

> The clear import of treaty language controls unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."

Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180, 102 S.Ct. 2374, 2377, 72 LEd.2d 765 (1982), *quoting Maximov v. United States*, 373 U.S. 49, 54, 83 S.Ct. 1054, 1057, 10 L.Ed.2d 184 (1963).

[26] "An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its objects and purpose." Restatement of the Law (Second) Foreign Relations Law of the United States (Revised), Tentative Draft No. 6 (1985), § 325(1). This same rule of interpretation is prescribed by the Vienna Convention of the Law of Treaties Article 31(1). S.Exec.L. 92d Cong., 1st Sess. (1971), 8 I.L.M. 679. As the State Department has noted, "the Convention is already recognized as the authoritative guide to current treaty law and practice." *Id.*

35% of the cargo or more[27] to the *next lowest bidder* – a shipper from the other country.

However, under the Navy's construction of the MOU, and under the awards procedure it contemplates, the "next lowest bidder" will never receive any portion of the contract. That result is achieved by having two competitions rather than one: once the lowest bidder from one country wins the contract for 65% of the cargo, instead of the remainder going to the next lowest bidder, a second competition is held for that remainder at which, again, the lowest bidder prevails. With respect to neither competition will the "next lowest bidder" even be considered; it would have to be the lowest bidder in the second competition to receive any portion of the contract.[28] The language in the MOU referring to the "next lowest bidder" is simply disregarded and given no effect.

The language of the MOU – which the Court finds to be unambiguous in its support of Rainbow's position – is further buttressed by the construction placed thereon by the Secretary of Defense himself. Secretary Carlucci wrote as follows on March 25, 1988 to Senator Lugar of Indiana, a member of the Committee on Foreign Relations:[29]

> The treaty and implementing memorandum of understanding foster competition between U.S. and Icelandic flag carriers for 100 percent of the cargo transported by sea between Iceland and the United States for purposes of the 1951 Defense Agreement between the two countries. The overall low bidder is awarded 65 percent of the cargo and the low bidder of the other country is awarded the remaining 35 percent. This is how the existing contracts were awarded.

Thus, the Secretary concluded that the MOU requires a single competition in which the contestants bid for 100% of the cargo, and

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[27] More than 35% of the cargo will be so awarded if the lowest bidder takes less than 65%.

[28] Rainbow claims that, for a variety of reasons it will not be able to compete effectively under the Navy's two competition system, and the Court is persuaded on the basis of the evidence available at this juncture, that this representation is correct.

[29] Secretary Carlucci's letter was attached to the Union's motion for preliminary injunction.

that the "overall low bidder" wins a contract to carry 65% of the cargo, while the "remaining 35 percent" goes to the low bidder from the other country – precisely as Rainbow asserts. Any still remaining doubt is allayed by the Secretary's reference to a continuation of the method by which the existing contracts were awarded. Those (1987) contracts were, of course, awarded precisely on the basis of the interpretation of the MOU urged upon the Court by Rainbow.

V

Rainbow and its seamen have an extremely strong likelihood of success on the merits. These parties also stand to be irreparably harmed if the procurement is not enjoined. As concerns Rainbow, its business would in all likelihood have to be shut down; as regards the Union, its members employed by Rainbow will lose their jobs. Indeed, the Court is persuaded, on the basis of the evidence before it, that Rainbow cannot secure alternate shipping business and that, in view of the depressed nature of the American merchant marine, its seamen are unlikely to find new employment.

By issuing a preliminary injunction, the Court preserves the status quo between the parties.[30] And, in view of the existence of present arrangements, there will be no interruption of the delivery of the cargo and thus no injury to the public interest or to the defendants.

VI

As indicated, the recent events connected with implementation of the treaty represent the third time that the Navy has attempted to eliminate Rainbow, a small American-flag shipper, from the Icelandic trade. In 1985, the Navy announced and assured the Court that Rainbow had to be disqualified from a cargo preference because its rates were excessive. Upon examination, it was found that this was untrue and that the real reason for the attempted disqualification was the Department of State's plan to permit Icelandic shippers to regain

[30] Rainbow will continue to carry its share of the cargo under the 1987 procurement, and so will Eimskip, the Icelandic carrier. The Court takes no position on the issue of how Eimskip should be paid for transporting its 65% of the cargo during the period of this injunction. That is a matter for resolution between the Navy and Eimskip.

their monopoly with respect to that trade. In 1986, the Navy assured the Court that Rainbow's services could be dispensed with because military aircraft which were flying by way of Iceland anyway could perform Rainbow's role. Upon inquiry, it became apparent that, contrary to the Navy's assurances and contrary to binding regulations, military aircraft were capable of taking on that role only if they were diverted from their normal duties.

Now the Navy is attempting to eliminate Rainbow once again, this time under the treaty with Iceland. The present effort is as disingenuous as the other two. The construction of the memorandum of understanding adopted by the Navy is contrary to the ordinary meaning of the language contained in that document. It is contrary also to the assurances given by Mr. Derwinski and Rear Admiral Piotti, Jr., to the Senate Committee on Foreign Relations when the treaty was before that committee for ratification. And it is contrary, finally, to an interpretation of the treaty announced just two months ago by Secretary of Defense Carlucci himself.

The Court understands that Iceland is a staunch ally of the United States, and it sympathizes with the efforts of our government to satisfy the demands of that nation. But this may not be done at the expense of one of the few remaining American-flag vessels of our merchant marine and the few remaining American seamen who have found employment there. More particularly, this may not be done in violation of American law, of the language and purpose of a treaty, and of the solemn representations made to the United States Senate in connection with the ratification of that treaty.

The Court has accordingly, once again, enjoined the Navy's attempt to put Rainbow out of business.

United States Court of Appeals

For the District of Columbia Circuit

No. 89-5019
September Term, 1990

USDC Civ. No. 88-0992

Rainbow Navigation, Inc., et al.

v.

Department of the Navy, et al.,

Appellants

and Consolidated Case No. 89-5020

BEFORE:

Ruth B. Ginsburg, D.H. Ginsburg and Sentelle
Circuit Judges

ORDER

Upon consideration of appellees' Petition of Rehearing, filed October 9, 1990, it is

Ordered, by the court, that the petition is denied.

Per Curiam
For the Court:
Constance L. Dupre, Clerk

United States Court
of Appeals For The
District of Columbia Circuit

FILED NOV 07 1990

CONSTANCE L. DUPRE
Clerk

By: /s/
Robert A. Bonner
Deputy Clerk

United States Court of Appeals

For the District of Columbia Circuit

No. 89-5019
September Term, 1990

USDC Civ. No. 88-0992

Rainbow Navigation, Inc., et al.

v.

Department of the Navy, et al.,

Appellants

and Consolidated Case No. 89-5020

BEFORE:

Wald, Chief Judge, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

ORDER

Appellees' Suggestion for Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

Ordered, by the Court *en banc*, that the suggestion is denied.

United States Court
of Appeals For The
District of Columbia Circuit

FILED NOV 07 1990

CONSTANCE L. DUPRE
Clerk

Per Curiam
For the Court:
Constance L. Dupre, Clerk

By: /s/
Robert A. Bonner
Deputy Clerk

Chief Judge Wald and Circuit Judge Silberman did not participate in this matter.

United States Court of Appeals

For the District of Columbia Circuit

No. 89-5019
September Term, 1990

CA. No. 88-0992

Rainbow Navigation, Inc., et al.

v.

Department of the Navy, et al.,

Appellants

and Consolidated Case No. 89-5020

BEFORE:

Ruth B. Ginsburg, D.H. Ginsburg and Sentelle
Circuit Judges

ORDER

Upon consideration of the motion of the U.S. Merchant Marine appellees for stay of mandate, the responses thereto and of the reply, it is

Ordered, by the Court, that the motion is granted and the Clerk is directed to withhold issuance of the Court's mandate for a period of thirty days from the date of this order.

United States Court
of Appeals For The
District of Columbia Circuit

FILED DEC 04 1990

CONSTANCE L. DUPRE
Clerk

Per Curiam
For the Court:
Constance L. Dupre, Clerk

By: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX B

Treaty Between the United States of America and the Republic of Iceland to Facilitate Their Defense Relationship

The Government of the United States of America and the Government of the Republic of Iceland,

Considering that the Government of the United States of America and the Government of the Republic of Iceland have, by the Defense Agreement Pursuant to the North Atlantic Treaty between the United States of America and the Republic of Iceland, signed on May 5, 1951 ("Defense Agreement"), long maintained arrangements for the use of facilities in Iceland in defense of Iceland and thus also the North Atlantic Treaty area;

Noting the significance of the Defense Agreement in United States-Icelandic relations as well as its unique importance to the North Atlantic Treaty Organization;

Recognizing the need for equitable participation by the United States and Iceland in the burdens and benefits of the Defense Agreement;

Taking into account the historic participation of vessels operating for Icelandic shipping companies and vessels of the United States in the carriage of military cargo between the United States and Iceland in support of the defense arrangements established pursuant to the Defense Agreement;

Recognizing that equitable participation of vessels of both countries in the carriage of cargoes for purposes of the Defense Agreement will strengthen the relations of the Parties and further mutual cooperation in essential areas of defense;

Acknowledging the vital importance of securing adequate ocean transportation services between Iceland and the United States with vessels operating for Icelandic shipping companies and vessels of the United States during the period of the Defense Agreement;

Reaffirming the contribution of Iceland to the vital sea link that binds the members of the North Atlantic Treaty Organization;

Have agreed as follows:

ARTICLE I

Transportation services for cargo transported by sea between Iceland and the United States for purposes of the Defense Agreement shall be provided by vessels of the United States and vessels operated by Icelandic shipping companies on the basis of competition between United States flag carriers and Icelandic shipping companies pursuant to this Article. Any such competition shall result in contract awards that ensure that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade. To ensure achievement of these objectives, the percentage of cargo transported by sea for purposes of the Defense Agreement that is allocated between vessels operated by Icelandic shipping companies and vessels of the United States on the basis of such competition shall be determined by agreement between the United States and Iceland.

ARTICLE II

This Treaty shall be ratified by the Government of the United States of America and the Government of the Republic of Iceland in accordance with their respective constitutional processes. It shall enter into force upon the exchange of instruments of ratification at Reykjavik.

ARTICLE III

(1) This Treaty shall remain in force as long as the Defense Agreement or a successor agreement remains in force. Either Party may, at any time, give notice to the other of its intention to terminate this Treaty. Termination shall take effect 12 months from the date of such notice.

(2) This treaty shall not preclude the application of measures deemed necessary by either Party to protect its essential security interests.

ARTICLE IV

The provisions of this treaty and any implementing arrangements concluded pursuant to Article I shall apply notwithstanding any prior inconsistent law or regulation of the United States of America or the Republic of Iceland.

IN WITNESS WHEREOF, the undersigned, being duly authorized for this purpose, have signed this Treaty.

DONE at New York, this 24th day of September, 1986, in duplicate in the English language. The Government of the Republic of Iceland shall provide through diplomatic channels the official translation of the Treaty in the Icelandic language.

FOR THE GOVERNMENT OF
THE UNITED STATES OF
AMERICA:

/s/

FOR THE GOVERNMENT OF
THE REPUBLIC OF ICELAND:

/s/

Memorandum of Understanding Between the United States of America and the Republic of Iceland in Implementation of the Treaty to Facilitate their Defense Relationship

The Government of the United States of America and the Government of the Republic of Iceland,

In implementation of the Treaty between the United States of America and the Republic of Iceland to Facilitate their Defense Relationship, signed at New York on September 24, 1986,

Have agreed as follows:

1. Transportation services for cargo transported by sea between Iceland and the United States for purposes of the Defense Agreement shall be provided by vessels of the United States and vessels operated by Icelandic shipping companies on the basis of periodic competitions between United States flag carriers and Icelandic shipping companies. Each competition shall result in contract awards to both an Icelandic shipping company and a United States flag carrier such that not to exceed 65 percent of the cargo shall be carried by the lowest bidder and the remainder shall be carried by the next lowest bidder of the other country, provided that the lowest bidder shall not be precluded from carrying additional cargo if the next lowest bidder of the other country is unavailable. However, in the event that the next lowest bidder is a United States flag carrier and the United States contracting authority notifies that carrier that it believes that the carrier's bid is unreasonable, the carrier shall submit all data pertinent to its costs of carriage. These data shall be reviewed by the United States contracting authority, which shall award this contract at a fair rate that adequately covers the carrier's costs, assuming normal efficiencies of operation, plus a reasonable profit. If the next lowest bidder is an Icelandic shipping company and the United States contracting authority believes that its bid is unreasonable, the Parties shall consult with a view to establishing a reasonable rate for the contract.

2. This Memorandum of Understanding shall enter into force on the date of entry into force of the Treaty between the United States of America and the Republic of Iceland to Facilitate their Defense Relationship, signed on September 24, 1986. This Memorandum of Understanding shall remain in force as long as that Treaty remains in force.

3. The Parties shall review on an annual basis the operation of this Memorandum of Understanding with a view to enhancing competition and ensuring the viability of the carriers of both countries operating in the trade. This Memorandum of Understanding may be amended by mutual agreement of the Parties at any time.

IN WITNESS WHEREOF, the undersigned, being duly authorized for this purpose, have signed this Memorandum of Understanding.

DONE at New York, this 24th day of September, 1986, in duplicate in the English language. The Government of the Republic of Iceland shall provide through diplomatic channels the official translation of the Memorandum of Understanding in the Icelandic language.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

/s/

FOR THE GOVERNMENT OF THE REPUBLIC OF ICELAND:

/s/

10 U.S.C. § 2631 provides:

§ 2631. Supplies: preference to United States vessels

Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons.

Supreme Court, U.S.
FILED
FEB 6 1991
OFFICE OF THE CLERK

(2)

NO. 90-1062

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAINBOW NAVIGATION, INC., and
INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS,

Petitioners,

v.

DEPARTMENT OF THE NAVY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT THE ICELAND STEAMSHIP COMPANY, LTD. IN OPPOSITION

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QUESTIONS PRESENTED

The United States and the Republic of Iceland entered into a treaty and related memorandum of understanding with the objective of replacing the U.S.-flag monopoly on the transportation of military cargo created by the Cargo Preference Act of 1904 with a regime in which both Icelandic and U.S.-flag carriers compete for shares of the cargo, and the economic viability of both countries' carriers is ensured. The questions presented are:

1. Whether unambiguous treaty provisions, interpreted by the court below according to their clear import and obvious meaning, can be contradicted by ambiguous ratification history never formally communicated to or accepted by the other signatory to the treaty.

2. Whether the determination by the Court of Appeals, based on evidence of record, that the initial manner of implementation of the treaty by the Executive Branch reflected merely one example of what the treaty allowed, and did not serve to establish how the treaty was required to be applied, constitutes an error requiring correction by this Court.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT THE ICELAND STEAMSHIP COMPANY, LTD. IN OPPOSITION

STATEMENT OF THE CASE

The Iceland Steamship Company, Ltd.[1] ("Eimskip") hereby responds to the Petition for a Writ of Certiorari filed by Rainbow

[1] The Iceland Steamship Company, Ltd. is an Icelandic corporation engaged in ocean common carriage. Pursuant to Rule 29.1, the following is a list of the other companies in which this corporation holds a less than 100 percent stock interest: Aimenna bokafelagio hf.; Almennna Tollvorugeymsian hf.; Alpan hf.; Artek hf.; Buroaras hf.; D.N.G. hf.; Eignarhaldsfelag Lonaoarbanka Islands hf.; Eignarhaldsfelag Verslunarbanka Islands hf.; Eimskipafelag Islands hf.; Faxamarkaourinn hf.; Feroaskrifstofan Urval-Utsyn hf.; Fiskeldi Grindavikur hf.; Fiskimarkaourinn hf.; Fjarfestingarfelag Islands hf.; Flugleioir hf.; Frumkvaeol hf.; Hafnarbakki hf.; Hlutabrefasjoourinn hf.; Islensk Enduritrygging hf.; Islenska Utvarpsfelagio hf.; Marel hf.; Oliufelagio Skeljungur hf.; Oslax hf.; Polstaekni hf.; Saga Food Ingredients A/S; Sjova-Almennar tryggingar hf.; Skipaafgreiosla Jes Zimsen hf.; Slippstooin hf.; Skallagrimur hf.; Skjoldur hf.; Tollvorugeymsia Austurlands hf.; Tollvorugeymsian hf.; Taekniproun hf.; Prounanfelag Islands hf.

Navigation, Inc. ("Rainbow" or "the Petitioner") and the International Organization of Masters, Mates & Pilots ("IOMMP"). Eimskip was granted the status of intervenor in this proceeding by the District Court, based on its showing that as the incumbent Icelandic-flag carrier transporting U.S.-Iceland military cargo, it would be directly and substantially affected by the outcome of the litigation. Eimskip has actively participated throughout the proceedings before the District Court and the U.S. Court of Appeals for the District of Columbia Circuit.

Background

This litigation arises out of the interpretation and implementation by the U.S. Navy, Military Sealift Command ("MSC") of the Treaty of September 24, 1986 Between the United States of America and the Republic of Iceland to Facilitate Their Defense Relationship ("the Treaty") and an accompanying Memorandum of Understanding Between the United States of America and the Republic of Iceland in Implementation of the Treaty to Facilitate Their Defense Relationship ("the MOU"), both of which are set forth in Appendix B to the Petition. Pet. App. lb and 4b, respectively. The Treaty and MOU establish a unique regime governing transportation of military cargo moving between the U.S. and the NATO base at Keflavik, Iceland, which supersedes the provisions of the Cargo Preference Act of 1904, 10 U.S.C. § 2631 (1983) ("1904 Act") (reprinted at Pet. App. 6b).

The 1904 Act generally calls for U.S. military cargo to move on U.S.-flag vessels. For decades prior to 1984, however, all military cargo moving in the U.S.-Iceland trade was transported on Icelandic-flag vessels. The substantial volumes of cargo shipped by the military came to be relied on as a vital element in the economic viability of the Icelandic-flag shipping industry, which in turn constitutes a major factor in the economic well-being of the Republic of Iceland itself – a remote island nation with a population of only about 250,000, which has long been a strategically-important member of the NATO alliance.

In 1984, Rainbow was formed as a U.S.-flag carrier, operating a single vessel, with the avowed business strategy of invoking the 1904 Act to take away this military cargo from the Icelandic carriers which had previously been relied upon to transport it. The ensuing loss of

U.S. military cargo resulted in substantial adverse financial repercussions for the Icelandic-flag carriers, which was a matter of serious concern at the highest levels of the Icelandic Government, and thus threatened to disturb the positive relationship the U.S. had long enjoyed with this NATO partner.

To resolve the controversy, in 1986 the two governments entered into the Treaty and MOU, which supersede the 1904 Act in allowing Icelandic carriers to participate in the carriage of military cargo in this trade. The Treaty provides for the cargo to be divided between U.S. and Icelandic carriers on the basis of a competition such that both countries' carriers are able "to maintain a viable presence in the trade." Pet. App. 2b. The MOU goes on to provide for the low bidder in a single competition to receive 65 percent of the military cargo, and the lowest bidder of the other country to receive the remaining 35 percent, subject to the further proviso that if the "35 percent carrier" is unavailable during the term of the procurement to transport its full share, then the "65 percent carrier" may be allocated whatever cargo the "35 percent carrier" is unable to accommodate, in addition to its own 65 percent entitlement. Pet. App. 4b. Thus, the MOU contemplated a basic 65/35 percent division of the cargo, but recognized that the overall lowest bidder, which would be allocated the 65 percent share, could actually be given an even larger proportion of the cargo if the other carrier was "unavailable" to transport its full 35 percent share.

The Treaty explicitly provides for the competition to "result in contract awards that ensure that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade." Pet. App. 2b. Nevertheless, the motivation and objective of the two governments in entering into the Treaty was undisputably to restore an Icelandic-flag presence in the trade.[2] If the fundamental concern had been over the U.S.-flag carrier's economic

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[2] *See* President's Message to Congress Transmitting Treaty between the United States of America and the Republic of Iceland to Facilitate Their Defense Relationship with Related Memorandum of Understanding, signed at New York on September 24, 1986, S. Treaty Doc. No. 99-31, 99th Cong., 2d. Sess. (September 30, 1986). Joint Appendix to the Court of Appeals (hereinafter "J.A.") 46.

viability, the parties would have simply left alone the *status quo* under the 1904 Act, whereby Rainbow was accorded a *de facto* monopoly to carry as much of the military cargo as it could handle.

The Treaty Ratification Process

During the course of the Senate hearing on ratification of the Treaty, there was discussion of how the new Treaty regime would affect the incumbent U.S.-flag carrier in the trade, Rainbow Navigation. The State Department witness, Counsellor Edward J. Derwinski, specifically stated that "we did have in mind at all times the need to protect the interests of the current carrier" and that no U.S. interests would be injured in any way by ratification of the Treaty. *United States-Icelandic Treaty on the Carriage of Military Cargo: Hearing Before the United States Senate Committee on Foreign Relations*, 99th Cong., 2d Sess. 8, 11 (1986). J.A. 147, 150. On the other hand, in responding to a question as to what effect the Treaty would have on the "current American flag carrier," Counsellor Derwinski also said that "we could not provide, obviously, within the treaty for specific protection for an entity". *Id.* at 11. J.A. 150. Thus, what Counsellor Derwinski intended to convey to the Committee regarding whether Rainbow, as the current carrier, would be protected from injury as a result of ratification of the Treaty was, at best, ambiguous.

In its Report recommending ratification, the Senate Committee stated it was doing so:

> with the assurances of the Departments of State and Defense that . . . the treaty will be implemented in such a way that the existing United States-flag service in the Iceland trade would not be disadvantaged.

S. Rep. No. 27, 99th Cong., 2d Sess. 2, 3 (1986). J.A. 60. The Committee Report went on to state: "The Committee understands and expects that the economic viability of the United States-flag service will be maintained just as if the 1904 Act were fully in effect in the Iceland trade." *Id.* By referring to the existing U.S.-flag "service," the Committee Report is ambiguous as to whether it meant the incumbent carrier which was, as a practical matter, the only U.S.-flag "service" that had been operating in the Iceland trade, or carriage by U.S.-flag vessels in the generic sense. Pursuant to the Committee recommen-

dation, the Treaty was unanimously approved by the Senate on October 8, 1986, without attachment of any reservations or conditions qualifying the text of the Treaty. Nor is there any evidence that any communication was ever made to the other party to the Treaty, the Government of Iceland, of an intention to amplify the text of the Treaty itself by providing specific protection or subsidy for the incumbent U.S.-flag carrier.

Implementation of the Treaty and MOU

In 1987, MSC conducted the first procurement under the terms of the Treaty and MOU. In this competition, Eimskip was the lowest bidder of all, and thus was awarded the 65 percent share. Rainbow was the lowest (and only) bidder of the United States, and thus was awarded the 35 percent share. These contracts became effective May 1, 1987, and were to last for a one-year period.

In the Spring of 1988, as these contracts were nearing expiration, MSC initiated a new competition to award contracts for the following one-year period. The 1988 procurement differed from the earlier one in several technical respects. Among other things, it deleted these features that had been terms of the 1987 procurement: (l) that the U.S. part of the competition be conducted as a "small business set-aside"; (2) the requirement that bidders provide "under-deck stowage" (i.e., the facility to transport non-containerized break-bulk cargo below deck); (3) the requirement that vessels be equipped with onboard cranes; and (4) the possibility the U.S. carrier might be offered a "time charter" whereby it would be hired by the Navy on a full-time basis and used for other purposes when not carrying its share of the cargo between the U.S. and Iceland.

MSC explained that the restrictive specifications had been deleted from the 1988 procurement because it no longer envisioned entering into a time-charter of the U.S.-flag vessel to engage it for other purposes when not occupied in the U.S.-Iceland trade, and the restrictive specifications would only be relevant if such other uses were contemplated. J.A. 225. The 1988 procurement did not have a set-aside for small business because MSC's pre-procurement market survey indicated it was unlikely two or more qualified small busi-

nesses would bid on the contract[3] and under those circumstances the agency's regulations did not call for set-aside procedures.[4] J.A. 165, 170.

The 1988 procurement was enjoined by the District Court at the request of Rainbow and the IOMMP, which essentially contended the changes from the 1987 procurement terms were inconsistent with the representations made by Executive Branch officials to the Senate in connection with ratification of the Treaty, which Rainbow construed as protecting the economic viability of the particular class of U.S.-flag vessel with which Rainbow was serving the U.S.-Iceland trade at the time the Treaty entered into force. That order was reversed and vacated by a unanimous panel of the U.S. Court of Appeals, without remand, the court finding that the unambiguous language of the Treaty itself did not require the Government to ensure the economic viability of Rainbow or the class of vessel to which its ship belonged as distinguished from the U.S.-flag service as a whole. Pet. App. 1a. Rainbow's subsequent Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied by the Court of Appeals. Pet. App. 49a-50a. It did, however, grant Rainbow's request, supported by Eimskip, for a stay of the mandate pending submission to and action by this Court on a Petition for Writ of Certiorari. Pet. App. 51a.

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[3] In the 1987 procurement, which was conducted as a set-aside for small businesses, Rainbow was the only U.S. company which submitted a bid.

[4] The 1988 procurement initially called for separate competitions for the 65 percent and 35 percent shares of the cargo; in other words, a carrier with capacity to accommodate no more than the 35 percent share would have the option to bid only for that portion of the cargo without participating in the competition for the 65 percent share. In the course of the present litigation, MSC abandoned this element of its proposal and indicated it would conduct a unified competition with the overall low bidder receiving 65 percent of the cargo, and the lowest bidder of the other country receiving the remaining 35 percent, as provided in the MOU.

REASONS FOR DENYING THE WRIT OF CERTIORARI

A. The Court of Appeals Decision Rests On the Well-settled Principle of Law that a Treaty Should be Interpreted Based on its Plain Language

The Court of Appeals analysis and decision begins with the following recitation of black-letter law:

> Our analysis "must, of course, begin with the language of the Treaty itself." *Sumitomo Shoji America Inc. v. Avagliano*, 457 U.S. 176, 180 (1982).
>
> > The clear import of treaty language controls unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."
>
> *Id.* (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963)).

Rainbow Navigation Inc. v. Department of the Navy, 911 F.2d 797, 801 (D.C. Cir. 1990), Pet. App. 9a. Applying this analysis, the court below immediately went on to observe:

> By its terms, the Treaty and the MOU require only (l) that the Navy award contracts by means of a competition; (2) in a manner that "ensure[s] that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade"; and (3) that the lowest U.S. bidder receive at least 35 percent of the cargo.

Id. Indeed, Rainbow has not, and could not, argue that any language in the Treaty itself confers special protection for it, as the incumbent carrier at the time the Treaty was signed, or for the class of ship to which its vessel happens to belong. Rather, as the Court of Appeals pointed out, the text of the Treaty provides nothing more than for the Navy to hold a competition, resulting in awards to both U.S.-flag and Icelandic-flag carriers, with the U.S. carrier to receive at least 35 percent of the cargo.

It is undisputed that the Treaty was entered into at the instigation of the Icelandic Government based on its concern over its carriers being dispossessed of the military cargo they had carried for decades until Rainbow appeared on the scene and invoked the U.S.-flag monopoly provided by the 1904 Act. The purpose of the Treaty, without question, was to restore an Icelandic-flag presence in the carriage of U.S. military cargo – not to protect Rainbow.[5] Thus, it should hardly be surprising the plain language of the Treaty contains absolutely nothing to support Rainbow's claim of protected status. Under circumstances such as these, where the plain language of a treaty, consistent with the purpose of the contracting parties in entering into it, fails to provide for the claimed relief, there is no case law support whatsoever for going on to discern such relief from ambiguous ratification history. Indeed, none of the cases relied upon by Rainbow even calls for the examination of the ratification history of a treaty the text of which is unambiguous.[6]

In *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), the Court undertook to interpret a treaty provision based on examination of the literal language of the treaty itself, which yielded

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[5] *See, e.g.*, Letter of Transmittal accompanying the Treaty at the time it was sent to the Senate for ratification, in which President Reagan stated:

> The Government of Iceland has taken the position that because Iceland's economy and security depend upon its shipping lines, and because of our mutual defense interests, Icelandic lines should have the opportunity to compete for participation in this trade. Iceland's serious concern about this defense issue has been expressed at the highest levels. This Treaty will resolve this matter and will further the cooperation of the United States and Iceland in essential areas of defense.

President's Message to Congress Transmitting Treaty between the United States of America and the Republic of Iceland to Facilitate their Defense Relationship with Related Memorandum of Understanding, signed at New York on September 24, 1986, S. Treaty Doc. No. 99-31, 99th Cong., 2d. Sess. (Sept. 30, 1986). J.A. 47.

[6] As Justice Scalia noted in his concurring opinion in *United States v. Stuart*, 489 U.S. 353, 376 (1989), the District Court decisions in this litigation (subsequently reversed and vacated by the Court of Appeals) constituted "[t]he first (and, as far as I am aware, the only) federal decisions relying upon pre-ratification Senate materials for the interpretation of a treaty."

a result consistent with the stated intent of the parties to the treaty as expressed in submissions to the Court during the pendency of the litigation – approximately thirty years *after* the treaty was negotiated, ratified and entered into force. The *Sumitomo Shoji* decision did not even reference, much less rely on, the course of ratification proceedings before the Senate, or negotiating materials (in diplomatic parlance, known as *travaux preparatoires*). Rather than relying on Senate ratification materials, the Court stated: "Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji*, 457 U.S. at 184-85 (footnote omitted), quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). In applying this principle, the Court looked not to what went on in the colloquy between the Executive and the Senate at the time the treaty in question was submitted for the Senate's advice and consent, but to the position taken by the Executive Branch in connection with the then pending litigation, as evidenced by the brief submitted by the United States as *amicus curiae*. Here, as in *Sumitomo Shoji*, the position of the U.S. Government is quite clear, as manifested in its submissions to the District Court and Court of Appeals: The plain language of the Treaty contains no specific protection for Rainbow, and MSC should be free to structure its procurements in any manner that provides for a *competition*, in which awards are made to *both U.S. and Icelandic carriers*, and in which the U.S. carrier *receives at least 35 percent of the cargo*. Since the proposed procurement under challenge in this litigation concededly meets those requirements, the precedent of *Sumitomo Shoji* requires MSC to go no farther.

Likewise, *Maximov v. United States*, 373 U.S. 49 (1963), fails to provide support for the premise of Rainbow's argument that ratification history can be given authoritative weight in interpreting a treaty. There, the Court first found: "The plain language of the Convention does not afford any support to the petitioner's argument. . . ." *Id.* at 52. The Court went on to state:

> Moreover, it is *particularly* inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a

> result inconsistent with the intent or expectations of its signatories.

Id. at 54 (emphasis added). As Justice Scalia discussed in his concurring opinion in *United States v. Stuart*, 489 U.S. 353, 372 (1989), the import of this statement was not that it would be appropriate under some circumstances to deviate from the plain language of a treaty, but rather that such an approach would be *particularly* inappropriate if this would effect a result inconsistent with the expectations of the signatories.

Here, as in *Maximov*, there has been no showing the signatories – *i.e.*, the Icelandic and U.S. Governments – intended by their Treaty to provide special protection for the incumbent U.S. carrier, or indeed any specific carrier or class of vessels. If anything, they intended to take away the monopoly on this cargo which Rainbow had enjoyed under the 1904 Act and re-introduce Icelandic-flag competition into the trade. Accordingly, as the Court said in *Maximov*, it would be "particularly inappropriate" to deviate from the clear import of the language of the Treaty itself.[7]

In *O'Connor v. United States*, 479 U.S. 27 (1986), likewise, no reliance was placed on ratification history in the interpretation of a treaty. The meaning of the provision at issue in that case was initially determined based on an examination by the Court of the entire text of the Treaty itself – not its ratification history. After deciding what the plain language of the treaty meant without recourse to extrinsic sources, the Court went on to state:

> While the Claims Court may have been correct that the negotiating history does not favor the Government's position sufficiently to overcome what that court regarded as a plain textual meaning in favor of the taxpayers, it certainly

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[7] *In Maximov*, the Court cited in a footnote, but did not discuss or rely on in any way, the Letter of Transmittal from the President to the Senate, as well as the Report of the Secretary of State (see 373 U.S. at 54 n.2). Significantly, the Court did not even mention any colloquy conducted during the Senate hearing, Report language put forward by the Senate Foreign Relations Committee, or Senate floor debates.

> does not favor the taxpayers' position sufficiently to affect our view of the text.

Id. at 35. Thus, the interpretation of the treaty provision at issue in *O'Connor* was determined through examination of the plain language of the treaty text itself, the Court specifically finding the negotiating history did not favor either side in the dispute.[8]

Thus, the sum and substance of the case law relied upon by Rainbow stands for nothing more than the longstanding black letter law precept that treaties are to be interpreted according to the clear import and obvious meaning of the language set forth in the treaty document itself. In *Sumitomo Shoji*, the two governments which were parties to the treaty merely confirmed to the Court their concurrence with the "plain meaning" construction the Court itself developed. In *Maximov*, the Court stated it would be *particularly* inappropriate to consider extraneous materials when, as here, the obvious meaning of the words of the treaty has not been shown to be inconsistent with the objectives of the two governments in entering into the treaty. And in *O'Connor*, the Court determined the meaning of the treaty provision at issue without resort to extrinsic materials, and went on to observe that the negotiating history did not particularly favor either side in the litigation. In brief, Rainbow's theory that the Court should amplify the language of the U.S.-Iceland Treaty by resort to ratification history (which here is, at best, ambiguous) is devoid of precedential support

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[8] It is also significant that the Court looked only to the *negotiating* history of the treaty, not the ratification history. It considered earlier drafts of the treaty exchanged between the two governments, but did not refer to the Senate hearings, the Senate Foreign Relations Committee Report, or Senate floor debate. *See also Air France v. Saks*, 470 U.S. 392 (1985), in which the Court construed an ambiguous term of a treaty first by reference to the treaty text itself, *Id.* at 396-97, and went on to consider *negotiating* history (prior drafts exchanged among the signatories and the stated reasons for revisions to the drafts) but not the domestic ratification history. *Id. at 400-04.*

and totally inconsistent with extensive and longstanding jurisprudence on this question.

B. The Discussion Put Forward in *United States v. Stuart* Similarly Provides No Support for the Method of Treaty Interpretation Urged By Rainbow

Petitioner makes much of the Court's decision in *United States v. Stuart*, 489 U.S. 353 (1989), the opinions in which expressed somewhat differing views as to whether ratification history should be consulted in interpreting a treaty. In *Stuart*, all nine Justices concurred in the judgment that the treaty at issue, construed according to the plain meaning of the language set forth in the treaty document itself, did not support the relief claimed. The opinion of the Court, written by Justice Brennan, acknowledging the principle developed in *Maximov* and *Sumitomo Shoji* that "the clear import of treaty language controls," held that the relevant treaty provisions "on their face therefore lend no support to respondents' position." *Id.* at 366. The Court went on to state:

> The Senate Committee on Foreign Relations did not hold hearings on the Convention prior to its ratification in 1942, and the Committee Report did not even mention the provisions for exchange of information.... The President's message accompanying transmittal of the proposed treaty to the Senate [citation omitted] and the President's proclamation at the time the Convention was signed [citation omitted] similarly contain no language supporting respondents' argument. In any event, nothing in the history of the Convention's ratification buttresses respondents' claim.

Id. at 366-68 (footnote omitted). Thus, the *Stuart* decision rested not on use of ratification history to amplify ambiguous treaty provisions, but on a plain meaning construction of the treaty itself, with the observation added that the ratification history was silent on the point at issue. While the Court went on, in footnote 7 (489 U.S. at 367), to explain why reliance on pre-ratification Senate debates and reports could be proper, the fact is the holding in *Stuart* was in no way based on the content of such materials. As the above quotation makes clear,

it was quite evident to the Court the ratification history was silent on the treaty provision there at issue, and thus the question of utilization of pre-ratification materials to construe the treaty was not ripe for decision in that case.

Justice Kennedy, joined by Justice O'Connor, concurring in the judgment, emphasized that since the text of the treaty itself was not ambiguous, it was unnecessary to consider the import of the ratification history:

> It is quite unnecessary for the resolution of this case to explore or discuss the Senate proceedings that led to ratification of the 1942 Convention Respecting Double Taxation; for, as the court unanimously agrees, the text of the Treaty is quite sufficient to decide the issue before us.

Id. at 370.

The concurring opinion by Justice Scalia emphasized the point of law that extra-textual sources are to be given authoritative effect only if the treaty provision in question is ambiguous, and went on to express the view that even in such a case, the only materials which should be consulted are those which reflect the mutual agreement of the two sovereigns – *i.e.*, the negotiating history as distinguished from the ratification history. *Id.* at 373-74. Quoting from *New York Indians v. United States*, 170 U.S. 1, 23 (1898), Justice Scalia reasoned that whatever exchange may take place between the Executive Branch and the Senate in the domestic process of treaty ratification cannot be binding on the other signatory to the treaty, which was not a party to those discussions.[9]

[9] Justice Scalia went on to observe that the Senate indeed retains the "power to enforce its own understanding of treaties" through attaching conditions to its resolution of consent to ratification. No such action was taken with respect to the U.S.-Iceland Treaty. 489 U.S. at 374.

Justice Scalia further noted that Congress always has the power to abrogate a treaty by enacting inconsistent subsequent legislation. *Id.* at 375. To do so in the present case would presumably have serious foreign policy consequences considering the history and motivation for entering into the Treaty in the first place. As a matter of law, however, if Congress is truly dissatisfied with the interpretation given this Treaty by the Executive Branch or the courts, it may exercise the ultimate option of abrogating the Treaty as a matter of U.S. domestic law by enacting inconsistent legislation.

In this connection, the D.C. Circuit had occasion to consider the legal effect of understandings reached between the Senate and Executive Branch officials in the course of the treaty ratification process in *Power Authority of New York v. Federal Power Commission*, 247 F.2d 538 (D.C. Cir. 1957), *vacated and remanded with directions to dismiss as moot sub nom American Pub. Power Ass'n v. Power Authority of New York*, 355 U.S. 64 (1957). While that decision does not serve as binding precedent because of the subsequent dismissal for mootness, it provides a persuasive discussion of the reasons why a Senatorial condition of purely domestic effect should not be regarded as an enforceable qualification on the language of the treaty itself. The court explained:

> The reservation made no change in the treaty. It was merely an expression of domestic policy which the Senate attached to its consent. It was not a counteroffer requiring Canadian acceptance before the treaty could become effective.

Id. at 541. While the court viewed the reservation as an expression of domestic policy on the part of the Senate, it held the statement was still not enforceable because the Constitution requires the concurrence of the House of Representatives in order to make domestic law.[10] *Id.* at 540.

The views of the Senate Foreign Relations Committee, and those of Senator Pell expressed on the Senate floor, regarding the future of Rainbow once the U.S.-Iceland Treaty was ratified, similarly concerned a matter of purely domestic effect which did not require concurrence of the Government of Iceland before the Treaty could become effective. Therefore, they should not be regarded as an enforceable amplification of the Treaty, as would a formal reservation on a matter of non-domestic concern which required the assent of the other sovereign. Furthermore, since the statements regarding future treatment of Rainbow were never presented to nor endorsed by the

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[10] That case considered a formal *reservation* attached by the Senate as a condition of its consent to ratification, which pertained to a solely domestic matter. In consenting to ratification of the U.S.-Iceland Treaty, the Senate did not adopt any such reservation or otherwise attempt to formalize the remarks contained in the Committee Report forwarding the Treaty to the full Senate, or any views expressed in the floor debate.

House of Representatives, they cannot otherwise be transformed into an element of enforceable U.S. domestic law. Under the reasoning expressed by the D.C. Circuit in *Power Authority of New York*, the ratification history of this Treaty should not be accorded authoritative weight.

The facts of this litigation, like those of the *Stuart* case, do not present for decision the question of whether it would be appropriate to consult ratification history if the provisions of the Treaty were ambiguous. As the D.C. Circuit has held, the provisions of this Treaty are quite unambiguous, imposing on the U.S. Government three specific and clear obligations none of which encompasses the relief claimed by the Petitioner. 911 F.2d at 801. Pet. App. 9a. The U.S.-Iceland Treaty calls for "contract awards that ensure that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade." Pet. App. 2b. It says nothing about special treatment for incumbent carriers or the class of vessels those carriers happen to use. As the Court held in *Stuart*, the pertinent provisions of the Treaty "on their face therefore lend no support to [Petitioner's] position." 489 U.S. at 366. The Court should not grant the instant petition for certiorari because this case presents nothing more than an opportunity to reaffirm what was already established in *Stuart* and a long line of prior precedent: When the plain language of a treaty is unambiguous, it is unnecessary and inappropriate to give authoritative weight to *any* extrinsic materials. It would be particularly unnecessary and inappropriate to do so in this case, where the text of the Treaty is clear while the ratification history contains considerable ambiguity. [11]

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[11] As expressed by the Court of Appeals: "Ambiguous ratification history cannot be allowed to obscure the meaning of clear Treaty language." 911 F.2d at 802. Pet. App. 11a. *See also Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989): "[W]here the text is clear, as it is here, we have no power to insert an amendment." (footnote omitted).

C. Rainbow is in Error in Attaching Authoritative Weight to the Manner in Which the Treaty was Initially Implemented by the Executive Branch

MSC's first procurement following entry into force of the Treaty contained a "time charter" option, required various vessel specifications, and was conducted as a small business set-aside (see *supra p.5), all of which were amenable to the interests of the Petitioner. The Court of Appeals rejected Rainbow's contention that this initial procurement served as evidence of what the Executive Branch believed the Treaty to require*, finding it to reflect, rather, nothing more than one version of what the Treaty would *permit*.[12] 911 F.2d at 802. Pet. App. 11a. The Court of Appeals found the terms of the procurement MSC attempted to conduct in 1988, which became the subject of this litigation, to be equally within the clear and unambiguous requirements of the Treaty. Rainbow is without support for its assertion that this analysis, supported by evidence of record, was incorrect and should be reversed.

The change in content between the 1987 and 1988 procurements was the result of reasoned decision-making by MSC, documented in its submissions to the District Court in connection with this litigation (see *supra* n.12). The Court of Appeals has reached its judgment that the MSC's action was valid and within the bounds of what the Treaty would allow. Such a fact-dependent determination, which even Rainbow admits is supported by evidence of record (see Pet. at 18), does not call for reexamination by the Supreme Court.

Even assuming, *arguendo*, the initial procurement reflected what MSC thought the Treaty required at that time, it is not estopped from changing that interpretation in the future. In the *Stuart* case, upon which Rainbow primarily relies in this connection, there was no change in the manner the treaty in question was interpreted by the Executive Branch since the time it entered into force. Thus, *Stuart*

[12] In this connection, the Government had submitted evidence to the District Court explaining the restrictive specifications in the initial procurement were included because MSC anticipated it would be able to productively use Rainbow's vessel in other trades when not engaged in carrying its allocated share of the U.S.-Iceland cargo. After one year of experience with this arrangement, MSC reconsidered and determined engagement of the vessel in such other trades was not appropriate to its then-current needs. J.A. 225.

neither presented nor answered the question, raised by Petitioner in this case, of whether a change in the Executive's manner of implementation of a treaty would prevail over its initial interpretation.[13]

That question was resolved, however, in *Sumitomo Shoji, supra*, which indeed was quoted in *Stuart* on this point (489 U.S. at 366). In *Sumitomo Shoji*, the Court had occasion to consider the varying interpretations of a treaty by the Executive Branch over time, and ruled that the most recent interpretation, which was found to be consistent with the Court's determination of the plain language of the treaty, was "entitled to great weight" notwithstanding that it was inconsistent with the prior State Department interpretation:

> The Court of Appeals and Sumitomo dismiss the Atwood letter as incorrect, and point to a letter written by a previous State Department Deputy Legal Advisor as taking the contrary view. [Citation omitted.] However, neither of these letters is indicative of the state of mind of the Treaty negotiators; they are merely evidence of the later interpretation of the State Department as the agency of the United States charged with interpreting and enforcing the Treaty. However ambiguous the State Department position may have been previously, it is certainly beyond dispute that *the Department now interprets the Treaty in conformity with its plain language*, and is of the opinion that Sumitomo is not a company of Japan and is not covered by Article VIII(1). That interpretation, and the identical position of the Government of Japan, is entitled to great weight. *Kolovrat v. Oregon*, 366 U.S. 187 (1961).

457 U.S. at 184 (emphasis added). Thus, rather than crediting Rainbow's argument that once the Executive Branch interprets a treaty in a particular way it is estopped from later changing its mind, the Court, in *Sumitomo Shoji*, accorded "great weight" to the most recent

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[13] Similarly, *O'Connor v. United States, supra*, presented a case of *consistent* Executive Branch interpretation and implementation of a treaty from the time of initial entry into force. There the Court merely noted the Executive Branch had consistently implemented the treaty in accordance with what the Court had determined to be the plain meaning of the treaty provisions at issue (479 U.S. at 33).

interpretation of the Executive notwithstanding that it supplanted the prior State Department interpretation.[14]

The U.S.-Iceland Treaty and MOU framework hardly contemplated that specific procurement provisions which MSC found appropriate to its needs for one particular year would be enshrined as the guidelines under which the competition would forever have to be conducted. If that had been the objective, surely the negotiators would have crafted such requirements into the MOU itself. Instead, the Treaty and MOU clearly envisioned MSC would be left to fashion the specifics of the "periodic competitions" in accordance with the changing exigencies of its traffic and other defense and commercial considerations. In revising the terms of the procurement from 1987 to 1988, MSC did nothing more than that. Moreover, in accordance with *Sumitomo Shoji*, what is dispositive is the *current* practice of the Executive in interpreting the Treaty, not the way it interpreted the Treaty in the past. Obviously, MSC currently interprets the Treaty as permitting its revised 1988 procurement, and the Court of Appeals was correct in upholding that determination.

CONCLUSION

The questions stated by Rainbow in its Petition for Certiorari, while suggesting interesting legal issues, are not in fact presented by this case. The D.C. Circuit correctly decided this case based on well-settled law that unambiguous treaty provisions should be construed according to the obvious import of the treaty language itself, and should not be supplanted by ambiguous ratification history. Since the textual provisions here at issue are not ambiguous, the extent to which reference is appropriate to extrinsic source materials in the course of interpreting an ambiguous treaty provision is not at issue. Whether ratification history, as distinguished from negotiating history, should be consulted in such an exercise is similarly not presented.

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[14] Furthermore, in *Sumitomo Shoji*, the current position of the Executive Branch was expressed in the form of a Brief to the Court submitted by the Solicitor General as *amicus curiae*. To the extent Rainbow would attach diminished weight to MSC's explanation of why it changed the terms of the procurement from 1987 to 1988

As to whether the current practice of the Executive Branch in implementing a treaty supersedes the prior inconsistent practice of the Executive Branch, the Court has already definitively answered that question in a manner adverse to the Petitioner's contentions.

In sum, the decision of the Court of Appeals does nothing more than restate and correctly apply a series of well-settled legal principles. It fails to raise any conflict with the decisions of the other Circuits or of this Court. For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1990

RAINBOW NAVIGATION, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States has an obligation, under a treaty with Iceland to facilitate their defense relationship, to guarantee the economic viability of a particular maritime shipping business.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1062

RAINBOW NAVIGATION, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 911 F.2d 797. The opinions of the district court (Pet. App. 14a-34a, 35a-48a) are reported, respectively, at 686 F. Supp. 354 and 699 F. Supp. 339.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1990. A petition for rehearing was denied on November 7, 1990. Pet. App. 49a-50a. The petition for a writ of certiorari was filed on January 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1986, the United States and the Republic of Iceland entered into a Treaty[1] and a related Memorandum of Understanding (MOU) to assure that "both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade" of transporting cargo to a United States military base at Keflavik, Iceland. Pet. App. 2b; see *id.* at 1a-5a. Petitioners Rainbow Navigation, Inc., et al., challenged the Department of the Navy's implementation of those agreements. The district court ordered the Navy to give special preference to Rainbow, concluding that the Treaty and the MOU requires the United States to assure Rainbow's "continued economic viability." *Id.* at 34a. The court of appeals reversed, holding that "[n]othing in the Treaty or the MOU, either on their faces or as illuminated during the ratification proceedings, vests any rights in Rainbow, as opposed to the U.S.-flag service generally." *Id.* at 4a.

1. Prior to 1984, the Navy transported military cargo to Iceland on Icelandic ships under common carrier tariffs on file with the Federal Maritime Commission. In 1984, Rainbow began operating a U.S. flag vesel in this trade, filing rates identical to those offered by the Icelandic carriers. As a result of the statutory preference for U.S. flag vessels under the Cargo Preference Laws, 10 U.S.C. 2631, Rainbow soon was transporting 70% of the Navy's shipments. The Government of Iceland strongly protested the

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[1] Treaty Between the United States of America and the Republic of Iceland To Facilitate Their Defense Relationship, Sept. 24, 1986, S. Treaty Doc. No. 31, 99th Cong., 2d Sess. (1986).

exclusion of Icelandic carriers from that portion of the trade. Pet. App. 4a.

In 1985 the Secretary of the Navy attempted to rescind Rainbow's entitlement to preferential treatment on the ground that the freight Rainbow charged was "excessive or otherwise unreasonable" (10 U.S.C. 2631), relying in part on the foreign policy consequences of the preference. The United States District Court for the District of Columbia concluded that the rescission was unwarranted and issued an injunction restoring Rainbow's preference. *Rainbow Navigation, Inc.* v. *Department of the Navy*, 620 F. Supp. 534 (D.D.C. 1985), aff'd, 783 F.2d 1072 (D.C. Cir. 1986). Petitioners remained in control of the bulk of the Icelandic trade, and Iceland announced that if Icelandic ships were excluded from competitive bidding, that nation would enact legislation prohibiting United States vessels from delivering their cargo. See S. Exec. Rep. No. 27, 99th Cong., 2d Sess. 2 (1986).

2. The United States and Iceland entered into the Treaty and MOU to resolve the continuing friction in U.S.-Icelandic relations. See Pet. App. 1b-5b. Under the Treaty, transportation of military cargo in the Iceland trade would be provided "on the basis of competition between United States flag carriers and Icelandic shipping companies" that "shall result in contract awards that ensure that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade." *Id.* at 2b. The Treaty also provided that the percentage allocation of cargo between U.S. flag carriers and Icelandic shipping companies would be determined by agreement between the United States and Iceland. *Ibid.* The agreement is spelled out in the MOU, which provides that each competition

> shall result in contract awards to both an Icelandic shipping company and a United States flag carrier such that not to exceed 65 percent of the cargo shall be carried by the lowest bidder and the remainder shall be carried by the next lowest bidder of the other country, provided that the lowest bidder shall not be precluded from carrying additional cargo if the next lowest bidder of the other country is unavailable.

Id. at 4b. The Treaty and MOU thus create a limited exception to the preference that U.S. flag carriers receive under the Cargo Preference Laws and permit Icelandic shipping companies to compete for up to 65% of the Iceland trade. *Id.* at 5a.

During ratification hearings before the Senate Committee on Foreign Relations, Senator Mathias asked Edward J. Derwinski, Counselor to the State Department, whether "there are any plans in effect to save harmless the current cargo carrier" in light of the Treaty. Pet. App. 5a. Counselor Derwinski answered that

> the current carrier has been involved in a number of discussions with appropriate authorities, and despite the fact that we could not provide, obviously, within the treaty for specific protection for an entity, we did have in mind at all times the need to protect the interests of the current carrier.

Id. at 6a. The Committee Report on the Treaty, the pertinent portions of which had been reviewed and endorsed by Counselor Derwinski, recommended ratification

> only with the assurance of the Departments of State and Defense that * * * the treaty will be implemented in such a way that the existing

> United States-flag service in the Iceland trade would not be disadvantaged as a result of the treaty. The committee received those assurances at its hearing, and recommends advice and consent on that basis only.

The Report further stated that "[t]he committee understands and expects that the economic viability of the United States-flag service will be maintained just as if the 1904 act were fully in effect in the Iceland trade." S. Exec. Rep. No. 27, *supra*, at 3. The Treaty was ratified by the Senate on October 8, 1986. 132 Cong. Rec. 29,520-29,521 (1986).

3. In 1987, the Navy held the first competition under the Treaty. In its Request For Proposals (RFP), the Navy invited Icelandic bidders to submit alternate bids based on carriage of either 65% or 35% of the trade; U.S. bidders, by contrast, were requested to submit alternate bids for either carriage of 65% of the trade or a time charter of the ship (conducted as a small business set-aside) "to meet other requirements of the Government on a worldwide basis" during the contract period. Pet. App. 6a.[2] Ultimately, the Iceland Steamship Company, Ltd. (Eimskip), an Icelandic carrier, won the 65% portion of the award and Rainbow, as the sole U.S. flag bidder, was awarded a time charter. *Ibid.*

In 1988, the Navy's RFP requested both Icelandic and U.S.-flag bidders to submit alternate bids for carriage of either 65% or 35% of the trade. Pet. App. 7a. The 1988 RFP also eliminated the time

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[2] Because of the variety of conditions which might be encountered under the time charter, the 1987 RFP also set forth a variety of restrictive specifications for that service, including 90,000 cu. ft. of underdeck cargo capacity and self-sustaining capability (*i.e.*, a ship with its own cranes).

charter (along with the associated restrictive specifications) and the small-business set-aside. *Ibid.* Instead of submitting a bid, petitioner Rainbow filed the instant suit, claiming that the changes to the 1988 RFP violated the terms of the Treaty and MOU by establishing two competitions for the trade rather than a single competition and by failing to ensure Rainbow's "economic viability." *Ibid.*

The district court issued a temporary restraining order and, later, a preliminary injunction barring the Navy from implementing the 1988 procurement and directing that carriage continue under the terms of the 1987 procurement. Pet. App. 35a-48a & n.30. That court ultimately granted Rainbow's motion for summary judgment, holding that the 1988 RFP violated the terms of the Treaty and MOU. *Id.* at 14a-34a. In the district court's view, the representations made by the Executive Branch to the Senate in connection with ratification of the Treaty "were intended to have the effect of granting to Rainbow, the current carrier, an advantage over what would have been the award process in the absence of such representations" and, thus, "the treaty vested rights in the 'current carrier,' *i.e.*, Rainbow, that override the Navy's * * * emphasis on the most economical means of carriage." *Id.* at 25a-26a. The district court consequently required the Navy to conduct future procurements to ensure that Rainbow "not be disadvantaged on account of the treaty." *Id.* at 34a.[3]

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[3] The specific requirements include a small business set-aside, various restrictive specifications from the 1987 procurement (see note 2, *supra*), and "a time charter arrangement or some other means equally effective to ensure that the continued economic viability of [Rainbow] is maintained as if the Cargo Preference Act of 1904 were fully in effect." Pet. App. 33a-34a. The district court also required "each bidder"

4. The court of appeals reversed. Pet. App. 1a-13a. The court stated that the plain language of the treaty and MOU "require[s] only (1) that the Navy award contracts by means of a competition; (2) in a manner that 'ensure[s] that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade'; and (3) that the lowest U.S. bidder receive at least 35 percent of the cargo." *Id.* at 9a. "The Treaty protects the United States-flag service as a whole, therefore, rather than any particular carrier." *Ibid.* Accordingly, the district court erred in requiring the Navy to impose special requirements "to ensure Rainbow's economic viability." *Id.* at 9a-10a.

The court of appeals observed that Rainbow "relies primarily upon the statements made or endorsed by the Executive Branch during the ratification proceedings" as the source of its asserted right to special treatment. Pet. App. 10a. Assuming "*arguendo* that the Executive's statements during the ratification process are relevant guides to interpretation of the Treaty," the court of appeals concluded that those statements were ambiguous and "cannot be allowed to obscure the meaning of clear Treaty language." *Id.* at 11a. The court also rejected Rainbow's argument that the restrictive specifications in the Navy 1987's RFP "reflect[] the Navy's contemporaneous interpretation of what the Treaty requires," concluding that inclusion of these specifications in the 1987 RFP

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to offer and "be required to provide service capable of carrying at least sixty-five percent of the trade." *Id.* at 33a. That specification prevents smaller U.S. flag carriers from competing with Rainbow (see *id.* at 29a) and has the effect of requiring the government to pay Rainbow as if it were carrying 65% of the trade, even if it is only awarded the 35% portion in a single competition.

"indicates not what the Navy believed the Treaty to require, but only what it believed the Treaty to allow." *Ibid.*

The court of appeals observed that the Navy had not implemented the Treaty "in a manner that makes it impossible or even difficult for Rainbow to qualify as a bidder" and that "[t]he danger cited by Rainbow, and by the district court"—"that domestic competition will edge Rainbow out of the Iceland trade and lead to its replacement by a lower bidding U.S. carrier"—"is not a danger from which Rainbow is entitled to be protected" under the Treaty and MOU. Pet. App. 12a.

ARGUMENT

Petitioners contend that the United States has an obligation, under a treaty between the United States and Iceland to facilitate their defense relationship, to guarantee the economic viability of Rainbow's maritime shipping business. The court of appeals correctly rejected that extraordinary contention. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Petitioners primarily contend that this Court should review the court of appeals' decision because its "opinion contravenes the principle, most recently restated in *United States* v. *Stuart*, [489 U.S. 353] (1989), that extratextual sources are useful and necessary tools of treaty construction." Pet. 11. As an initial matter, "this Court reviews judgments, not opinions," *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), and the court of appeals' judgment in this case is plainly correct. The court of appeals properly concluded that

the Treaty—which by its plain terms ensures that "both United States flag *carriers* and Icelandic shipping companies are able to maintain a viable presence in the trade" (Pet. App. 2b, emphasis added)—"protects the United States-flag service as a whole * * * rather than any particular carrier." Pet. App. 9a.[4]

Moreover, the court of appeals' method of analysis is entirely consistent with *Stuart*. In *Stuart*, this Court held that the 1942 Convention Respecting Double Taxation between the United States and Canada permitted the Internal Revenue Service to issue an administrative summons pursuant to a Canadian government request without first inquiring whether the Canadian tax investigation was directed toward criminal prosecution under Canadian law. See 489 U.S. at 355-356. In reaching that conclusion, this Court examined both the language and the ratification history of the Convention. *Id.* at 365-370.[5] Similarly, the court of appeals in this case examined both the Treaty's language and its ratification his-

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[4] Petitioners' various contentions that the Treaty and MOU were to preserve and protect "the class of U.S. flag vessels previously carrying the military cargo [i.e., Rainbow's vessel]" (Pet. 12), "the past market shares of the U.S. flag and Icelandic companies" (*id.* at 13), "Rainbow's class of vessel" (*id.* at 16), and "the *existing* operator, Rainbow" (*id.* at 17) find no support in the language of the Treaty or the MOU. See Pet. App. 1b, 2b, 4b (referring, without qualification, to "vessels of both countries," "vessels of the United States," and "United States flag carriers").

[5] Justices Kennedy, O'Connor and Scalia concurred in the judgment, concluding that "the text of the Treaty is quite sufficient to decide the issue" before the Court and that reference to the ratification history in the context of that case was unnecessary. See 489 U.S. at 370 (Kennedy and O'Connor, JJ., concurring); *id.* at 371-377 (Scalia, J., concurring).

tory, concluding that "[n]othing in the Treaty or the MOU, either on their faces *or as illuminated during the ratification proceedings*, vests any rights in Rainbow, as opposed to the U.S.-flag service generally." Pet. App. 4a (emphasis added); see also *id.* at 9a, 11a. Plainly, there is no conflict of approach between *Stuart* and the instant case.[6]

Indeed, petitioner's contention that the court of appeals "ignored" or "pa[id] scant attention to" the ratification history (Pet. 12, 16) is manifestly inaccurate. The court was willing to assume, for the purposes of this case, that "the Executive statements during the ratification process are relevant guides to interpretation of the Treaty." Pet. App. 11a.[7] The court disagreed, however, with petitioners' assertions as to the "import" of those statements, correctly explaining that "[a]mbiguous ratification history cannot be allowed to obscure the meaning of clear Treaty language." *Ibid.*[8]

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[6] Although petitioners criticize the court of appeals' reliance on the Treaty's text (Pet. 11-12, 13-14), this Court's decision in *Stuart* places great reliance on the "clear import of treaty language." See 489 U.S. at 365-366. See *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982) (quoting *Maximov* v. *United States*, 373 U.S. 49, 54 (1963)).

[7] The court observed that it had doubts as to whether "the specific representations made by the Executive in this case are interpretations of what the Treaty requires, as opposed merely to representations about how the Administration then intended to implement the Treaty." Pet. App. 10a-11a. The court declined, however, to analyze that issue further because "neither appellant has pressed this point" on appeal. *Ibid.*

[8] As that court explained, to the extent that the ratification hictory is unambiguous, it actually supports the government's —rather than petitioners'—interpretation of the Treaty. Pet. App. 9a. Counselor Derwinski stated to the Senate Foreign

Petitioners also contend, incorrectly, that the court of appeals failed to give sufficient consideration to the Navy's 1987 procurement practice. Petitioners argue that "the 1987 RFP represents the considered, contemporaneous understanding of the Navy as to what the Treaty and MOU require" and therefore the Navy could not alter the specifications set forth in that procurement. Pet. 17-19. The court of appeals properly concluded, however, that "the inclusion of these specifications in the RFP for 1987 indicates not what the Navy believed the Treaty to require, but only what it believed the Treaty to allow," and that, therefore, "elimination of those restrictive specifications * * * is not a departure from the Navy's previous interpretation, but merely a reflection of what else * * * the Treaty permits." Pet. App. 11a.[9] The Navy's discontinuance of the time

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Relations Committee that the government "could not provide * * * within the treaty for specific protection for an entity" such as Rainbow. *Id.* at 6a, 9a. Similarly, statements in both the Senate Report and on the Senate floor refer to protection of "the existing United States flag service"—rather than any particular carrier—in the Iceland trade. *Ibid.*, quoting S. Exec. Rep. No. 27, *supra*, at 3; 132 Cong. Rec. 29,521 (1986) (Senator Pell). While Counselor Derwinski noted that the government "did have in mind at all times the need to protect the interests of the current carrier" (Pet. App. 6a), that "interest" is the opportunity—shared with the U.S. flag service as a whole—to compete for Navy procurements.

[9] Petitioners' assertion that the "record stands unchallenged" on this point (Pet. 12-13, 18) is incorrect. The government explained by affidavit in the district court that the Navy included the time charter and associated restrictive specifications in the 1987 RFP because the Navy anticipated that it could make economical use of a vessel possessing those specifications by employing the ship in both the Iceland trade

charter and associated restrictive specifications in the 1988 RFP was entirely reasonable, in accord with the Navy's operational needs and in full conformity with all applicable legal requirements, including the Treaty and MOU.[10]

2. As the court of appeals explained, "the Navy has not implemented the Treaty in a manner that makes it impossible or even difficult for Rainbow to qualify as a bidder for the procurement." Pet. App. 12a. Petitioners simply seek protection from competition *by other U.S. flag service carriers* that can meet the United States' military needs at a lower cost. As the court of appeals correctly observed—and one would reasonably expect—"this is not a danger from which Rainbow is entitled to be protected." *Ibid.* Even if that question were close—and we sub-

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and for other "special missions" worldwide (such as intra-European cargo movements). See C.A. App. 225-229 (Affidavit Of James C. Toland, Captain, USN). The Navy subsequently found, through its experience in using Rainbow's vessel in this manner from July 1987 to January 1988, that the practice "was not economical for the Government" and that it no longer needed "a self-sustaining vessel to serve North Europe." *Id.* at 227. Indeed, the incremental cost of using Rainbow's vessel was "more than double the cost of using the high cost U.S. flag spot charters potentially available at the time." *Id.* at 228. Petitioners' assertion that this affidavit is "belied by internal Navy documents" (Pet. 18) is also incorrect. See C.A. Reply Brief For Federal Appellants at 19-21.

[10] Under general procurement law, the government has an obligation to obtain competitive prices for goods and services (see 10 U.S.C. 2301(a)(1), 2304(a)(1), 2305(a)(1)(A); 48 C.F.R. Ch. 1, 10.002(a)) and to limit the use of restrictive specifications except to the extent "necessary to satisfy the needs of the agency." 10 U.S.C. 2305(a)(1)(B)(ii); 48 C.F.R. Ch. 1, §§ 10.002(a)(3)(ii), 10.004.

mit that it is not—its resolution would be of importance only to the litigants themselves and plainly would not warrant this Court's review. See *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

1. There is no dispute that a treaty which has a plain meaning which admits of no ambiguity must be read as it stands, without reference to extratextual sources. Where does such a remarkable document exist, however? Certainly not in this case nor in most if not all treaty interpretation cases that have come before the Court. The great, endangering fault in the court of appeals opinion is that it finds purported clarity in treaty documents where none exists, then uses that purported clarity to overcome a ratification history specifically intended to give meaning to those documents. Unless the threshold determination of "clarity" is held to a standard of reasonableness in this leading case, the Executive Branch and the courts will have a clear precedent for ignoring at will the record developed in future Senate treaty ratifications. That would be contrary to the principle of treaty construction upheld in *United States v. Stuart*, 489 U.S. 353 (1989),

and would render superfluous the Senate's advice and consent role under Article 2, §2, cl. 2 of the U.S. Constitution.

2. The focus of the Federal Respondents is on the Treaty's applicability to "both United States flag carriers and Icelandic shipping companies." Fed. Resp. Brief 8-9. Under their view of the "plain" meaning of this language, so long as a U.S. flag carrier gets an award and that award covers at least 35% of the cargo, the meaning of the Treaty and MOU is honored. This conclusion is premised on a highly selective reading of the treaty documents. The fact that the Treaty requires an award to the U.S. flag is, standing by itself, meaningless. Such an award is otherwise required by the 1904 Preference Act. The Treaty and MOU create a limited exception to the 1904 Preference Act. It is other language in the Treaty and MOU which accomplishes the accommodation with the 1904 Act which was central to the concerns of both the Executive Branch and the Senate. That other language includes the commitment to assure both flags a "viable presence in the trade" and to assure the U.S. flag a "fair rate that adequately covers the carrier's costs, assuming normal efficiencies of operation, plus a reasonable profit." Treaty, Art. I (App. 2b); MOU, Par. 1 (App. 4b). "Viable presence" and "normal efficiencies of operation" is the operative language of the treaty documents. This language defies a plain meaning interpretation and begs reference to extratextual sources, yet it is ignored in the Brief of the Federal Respondents.

3. The ratification record must be read in its entirety and against the background of the long-standing dispute in the Iceland trade. It was a carefully crafted compromise, and that compromise was spelled out by Secretary Derwinski at the hearing and reiterated in the Committee Report. When Judge Greene found that the Treaty and MOU **required** (i) that "the existing United-States flag service in the Iceland trade would not be disadvantaged as a result of the treaty" and (ii) that "the economic viability of that service will be maintained just as if the 1904 Act were fully in effect," 699 F. Supp. at 344 (App. 23a), he was not voicing an opinion. He was quoting from the Committee Report which, in turn, was based on the direct representations of the Executive Branch. The Federal Respondents, as did the court of appeals, find this history to be ambiguous. Fed. Resp. Brief 10. If it is ambiguous, it is certainly far less so than the operative language in the treaty

documents. Moreover, to the extent that the ratification record leaves questions unanswered, those questions were resolved by the simultaneous implementation of the treaty by the Navy.

4. The court of appeals, without examining the record, held that the Navy's initial implementation of the treaty was no more than a temporary frolic dictated by operational concerns rather than by a compelling interpretation of the treaty requirements. The court of appeals also stated that Rainbow had provided "no basis for doubting" that operational concerns were the governing factor. 911 F.2d at 802 (App. 11a). In fact, Rainbow had tried this factual issue in the district court, and Judge Greene found, on the basis of the record, that the Navy's argument in this regard was pretextual. 699 F. Supp. at 345 (App. 24a). The Federal Respondents walk around this failing in the opinion by restating, in a footnote, the arguments advanced in the Navy's trial affidavit. Fed. Resp. Brief 11 n.9. Those same arguments, together with the facts developed by Rainbow in the course of discovery, led to Judge Greene's finding of pretext. The trial court's finding on this crucial factual issue is entitled to great weight, however stated.[1]

5. Eimskip argues that the ratification record is no more than an "expression of domestic policy" and is not entitled to great weight. Eimskip Brief 14-15. Since Eimskip now concedes that the ratifica-

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[1] Judge Greene's factual finding that the 1987 RFP was based on what the Navy believed the Treaty and MOU to require and not on operational considerations is reviewable under the clearly-erroneous standard or, at the very least, under the "deferential" abuse of discretion standard. *Cf. Pierce v. Underwood*, 487 U.S. 552, 558-62 (1988); *Thornburg v. Gingles*, 478 U.S. 30, 78-79 (1986). It is not subject to *de novo* review.

tion was not a formal reservation, it appears to be saying that the remarks of Secretary Derwinski *et al.* were no more than precatory. Suffice it to say that this argument was abandoned by the Federal Respondents in the early stages of the proceeding below. *See* 686 F. Supp. at 357 n.17 (App. 42a).

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